LIBRARY
COURT

FILED
NOV 26 1974
MICHAEL RODAK, JR., CL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-654

STATE OF TENNESSEE, EX REL,
OTIS O'DELL, ET AL, - - - - - - - - - *Petitioners*,

v.

CITY OF CHATTANOOGA,
ROBERT KIRK WALKER, ET AL, - - - - *Respondents*.

STATE OF TENNESSEE, EX REL,
ROBERT J. HICKS, ET AL, - - - - - - - *Petitioners*,

v.

CITY OF CHATTANOOGA,
ROBERT KIRK WALKER, ET AL, - - - - *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

THOMAS H. O'NEAL,
308 Maclellan Building,
Chattanooga, Tennessee 37402,
Telephone: 615/756-5111,

Attorney for Petitioners.

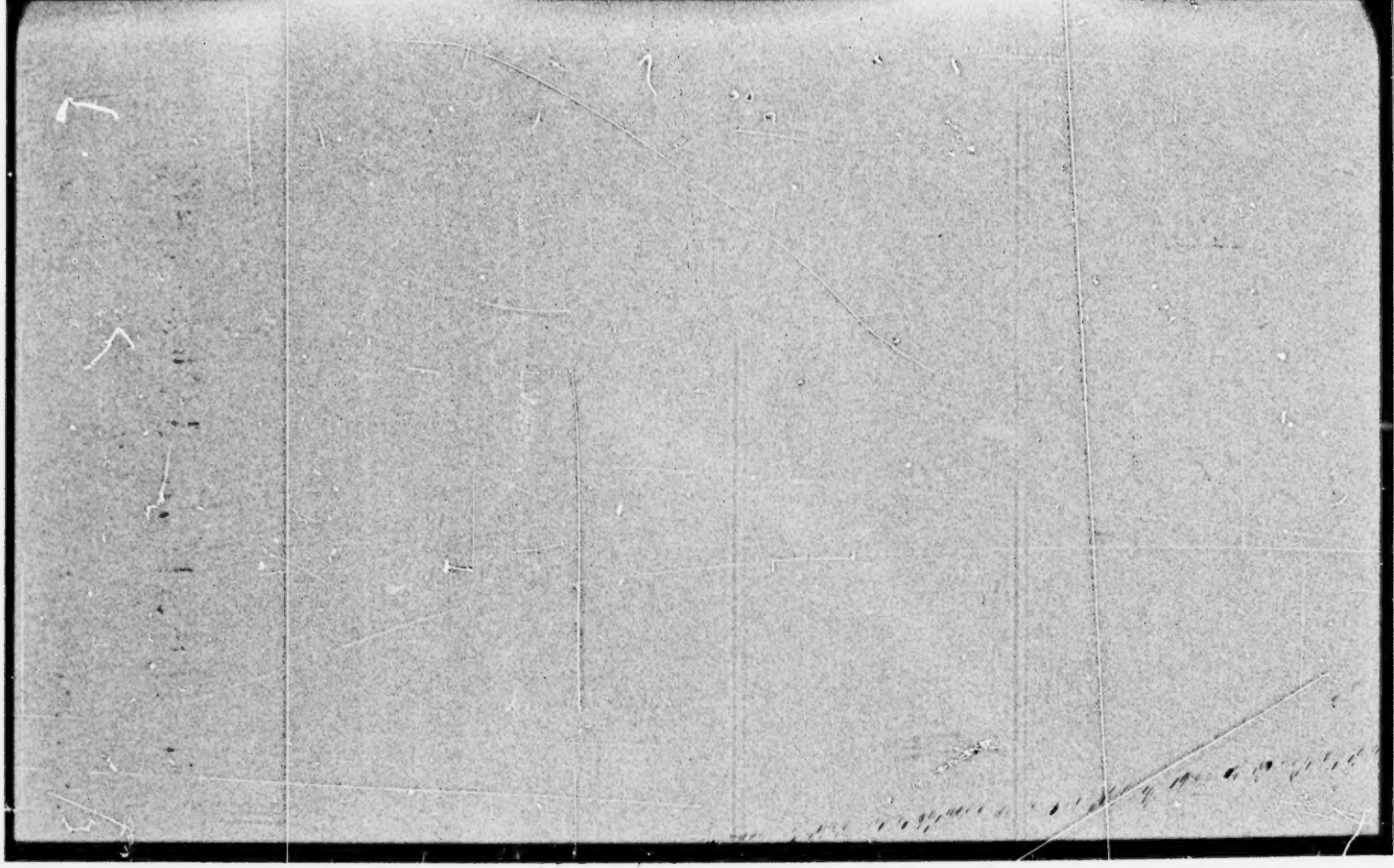

TABLE OF CONTENTS

	Page
OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINION OF THE COURTS BELOW	2
GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED	2
QUESTIONS PRESENTED FOR REVIEW	3
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATUTES INVOLVED	4
STATEMENT OF THE CASES	5
ARGUMENT	9
CONCLUSION	18
APPENDIX A – Memorandum Opinion, Filed 7-6-73	22
APPENDIX B – Amendment to Memorandum, Filed 7-23-73	32
APPENDIX C – Final Decree (Incorporates Amendment to Memorandum)	34
APPENDIX D – Opinion, Filed 7-29-74	38
APPENDIX E – Opinion on Petition to Rehear, Filed 8-30-74	46
APPENDIX F – Order, Filed 9-23-74	49
APPENDIX G – Tennessee Code Annotated, §6-309	50
APPENDIX H – Tennessee Code Annotated, §6-310	53

AUTHORITIES CITED

Cases:

Baker v. Carr, 369 Fla. 21, 149 So. 420	15, 16
City of Lawson v. Cates, (App. 1972) 485 S.W.2d 146	12

City of Mexico v. Hodges,
(App. 1972), 482 S.W.2d 545 13

City of St. Joseph v. Hankinson,
312 S.W.2d 4 12

Creve Coeur v. Brame,
(Mo. App.) 446 S.W.2d 173 13

Gomillion v. Lightfoot,
364 U.S. 339 ..... 10, 18

Gray v. Sanders,
372 U.S. 368 16

Lane v. Wilson,
309 U.S. 268 18

Marshall v. Mayor & Board of Selectmen,
382 U.S. 836 10

Portland General Electric Co. v. City of Estacada,
194 Or. 145, 241 P.2d 1129 ..... 13, 14, 15

State, ex rel, Attorney General v. Avon Park,
108 Fla. 641, 149 So. 409..... 15

State of Tenn. ex rel, Balsinger v. Town of Madisonville,
222 Tenn. 272, 435 S.W.2d 803 13

State, ex rel, Davis v. Largo,
110 Fla. 21, 149 So. 420..... 15

United States v. John J. Felin & Co., Inc.,
334 U.S. 640 10

Washington, ex rel, Oregon R. & Nav. Co. v. Fairchild,
224 U.S. 510 9

Text:

65 Am. Jur. 2d 308 14

Statutes:

Missouri Code 71.015 13
Tennessee Code Annotated 6-309 ... 3, 4, 6, 8, 10, 11, 15
Tennessee Code Annotated 6-310 .. 4, 5, 6, 11, 12, 13, 20
Tennessee Code Annotated 23-2801 17

Constitutional Provisions:

United States Constitution —
Amendment 14, Section [illegible] 4, 5, 6
Amendment 15, Section [illegible] 4, 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

STATE OF TENNESSEE, EX REL,
OTIS O'DELL, ET AL,

Petitioners

v.

CITY OF CHATTANOOGA,
ROBERT KIRK WALKER, ET AL,

Respondents

STATE OF TENNESSEE, EX REL,
ROBERT J. HICKS, ET AL,

Petitioners

v.

CITY OF CHATTANOOGA,
ROBERT KIRK WALKER, ET AL,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners in these two cases, which involve closely related questions, pray that a Writ of Certiorari

issue to review the opinion of the Supreme Court of the State of Tennessee as rendered in the above-styled cases on July 29, 1974.

OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINION OF THE COURTS BELOW

These cases originated in the Circuit Court of Hamilton County, Tennessee. The Honorable Sam E. Boaz, Judge of Law and Equity in Clarksville, Tennessee, was appointed by the Chief Justice of the Supreme Court of Tennessee to hear these cases. On July 3, 1973, Judge Boaz rendered a decision in favor of the petitioners against the respondents. A copy of his memorandum opinion appears as Appendix A. On July 21, 1973, Judge Boaz issued an amendment to his memorandum opinion, a copy of which appears as Appendix B. The respondents appealed to the Tennessee Supreme Court sitting at Knoxville, Tennessee. The Supreme Court reversed Judge Boaz and its opinion appears as Appendix D.

Thereafter, petitioners filed a petition to rehear and a copy of the opinion of the Supreme Court of Tennessee denying same filed on August 30, 1974, appears as Appendix E. Petitioners made application for special leave to file a second petition for rehearing, which was denied by the Supreme Court of Tennessee on September 23, 1974, and a copy of the order denying the application appears as Appendix F.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Tennessee which reversed the decision of the Trial Judge in these cases was filed on July 29, 1974.

The opinion of the Supreme Court of Tennessee denying petitioners' petition to rehear was filed on August 30, 1974, and the order denying petitioners' application for special leave to file a second petition for rehearing was filed on September 23, 1974.

This petition for writ of certiorari is filed under 28 USCA 1257 (3) and was filed within 90 days of August 30, 1974, the date of the opinion of the Supreme Court of Tennessee denying petitioners' petition to rehear.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONERS WERE DEPRIVED OF THEIR RIGHTS TO DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE SUPREME COURT OF TENNESSEE IN ITS ADOPTION OF A "FAIRLY DEBATABLE" TEST WHEN AS APPLIED BY THE SAID COURT DIMINISHES THE ROLE INTENDED BY THE TENNESSEE LEGISLATURE OF A TRIAL JUDGE IN AN ANNEXATION PROCEEDING AND IN EFFECT NULLIFIES THE LEGISLATIVE RIGHT OF PETITIONERS TO CONTEST THE VALIDITY OF AN ANNEXATION ORDINANCE.

II. WHETHER TCA 6-309, ANNEXATION BY ORDINANCE, VIOLATES THE ONE-MAN, ONE-VOTE PRINCIPLE AND IS THEREFORE UNCONSTITUTIONAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

III. WHETHER THE PETITIONERS' RIGHTS TO DUE PROCESS OF LAW UNDER THE FOURTEENTH

AMENDMENT TO THE UNITED STATES CONSTITUTION AND THEIR RIGHTS UNDER THE FIFTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THEY WERE DENIED THE RIGHT TO OFFER EVIDENCE OF A PRECONCEIVED AND UNCONSTITUTIONAL PLAN TO DILUTE THE VOICE AND INFLUENCE OF THE BLACK CITIZENS WITHIN THE CITY OF CHATTANOOGA.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14, U. S. Constitution, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 15, U. S. Constitution, Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

STATUTES INVOLVED

Tennessee Code Annotated 6-309. Annexation by ordinance. Text appearing as Appendix G.

Tennessee Code Annotated 6-310. Quo Warranto to Contest Annexation Ordinance. Text appearing as Appendix H.

STATEMENT OF THE CASES

On February 2, 1972, the respondents passed on third and final reading numerous ordinances seeking to annex territories to the City of Chattanooga, which would almost double the number of square miles within its municipal boundaries and increase its population by approximately 32,000 people. Separate areas were annexed by separate ordinances. For clarification, the petitioners in the case of *State, Ex Rel, Otis O'Dell, et al, v. City of Chattanooga, et al,* are residents and property owners of Area 4, known as Tiftonia, and the petitioners in the case of *State, Ex Rel, Robert J. Hicks, et al, v. City of Chattanooga, et al,* are residents and property owners of Area 12, known as Wauhatchie. On February 12, 1972, residents who lived in Area 4 and Area 12 filed suits in the nature of quo warranto proceedings to contest the validity of the annexation of their respective areas on the grounds set forth in Tennessee Code Annotated, Section 6-310, that it reasonably may not be deemed necessary for the welfare of the residents and property owners of Areas 4 and 12 and the municipality as a whole and so constitutes an exercise of power by the respondents not conferred by law. The petitioners in both cases raised in their complaints that the annexation of Areas 4 and 12 was preconceived to dilute the voice and influence of the black citizens and property owners within the present boundaries of the City of Chattanooga by extending its boundaries to include areas marked by an absence of black residents, and that as such said ordinances discriminate against the black citizenry of the City of Chattanooga and constitute a violation of the 14th Amendment of the United States Constitution; further, petitioners in both cases alleged in their complaints that the illegal exercise of power by the respondents constituted a violation of the due process and equal protection clause

of the 14th Amendment of the United States Constitution. In addition to these suits, two other similar actions were filed by the residents of Areas 13A, known as North Mountain Creek, and 9B, known as East Brainerd. By consent of the parties, all the cases were consolidated for trial. The cases came on to be heard together on March 19 through March 29, 1973, before the Honorable Sam E. Boaz.

After hearing all the proof, *a personal tour of the areas by the Court* and the entire record as a whole, Judge Boaz found that it was an unreasonable exercise of the legislative function delegated to the City of Chattanooga by the Legislature of the State of Tennessee to allow the annexation of Areas 4 and 12. Judge Boaz stated in his memorandum opinion which appears in the Appendix, Page 28.

> "It appears to the Court that TCA Section 6-309 provides a guideline to the legislative body of the municipality by providing that it determine that the prosperity of the municipality and proposed annexed area will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered unless annexation takes place and if the procedure therein outlined is followed then under section 6-310 if the annexation is contested it becomes a judicial function to determine whether the annexation is reasonably necessary for the welfare of the residents and property owners of the affected territory and the municipality as a whole giving consideration to the health, safety and welfare of the citizens and property owners of both the territory sought to be annexed and the citizens and property owners of the municipality.

Judge Boaz further stated in his memorandum opinion appearing on Page 29 of the Appendix:

". . . that it would be an unreasonable exercise of the legislative function delegated to the City of Chattanooga by the Legislature of the State of Tennessee to allow the annexation of Tiftonia and Wauhatchie in view of the proof mentioned above, that is that the natural growth of the city is to the north and east. Tiftonia and Wauhatchie are separated from the City of Chattanooga by the Tennessee River and by Lookout Mountain and are natural communities within themselves and are somewhat isolated from the city. There was virtually no proof of any relationship between the natural growth of the City of Chattanooga and the land area to the west of the city and, consequently, no proof that it would be necessary to plan the development of these areas for the future orderly development of the city. There was proof that the construction of I-24 had made these areas more easily accessible to the City of Chattanooga, but there was also proof that one of the principal arteries for transportation from this area was along the Cummings Highway, which passes through a county area before getting into the areas known as Tiftonia and Wauhatchie. The welfare of the residents and property owners of Tiftonia and Wauhatchie as well as the City of Chattanooga would not in the Court's opinion be adversely affected if the annexation of the two areas was not consummated. In view of the above findings and after giving due consideration to the topography and geographic features of the two areas as related to the city, the annexation of Tiftonia and Wauhatchie cannot reasonably be justified at this time, and it is the court's opinion that annexation would be unreasonable under the circumstances."

On August 14, 1973, a final decree was entered declaring Ordinance No. 6397, which annexed Area 4, and 6393,

which annexed Area 12, unreasonable and vacating same. Regarding the other two cases filed by residents and property owners of 13A and 9B, Judge Boaz found for the respondents and upheld the validity of the annexation ordinances. With respect to the decisions in the present cases involving Areas 4 and 12, respondents filed a motion for a new trial or reconsideration, which was overruled in both cases by Judge Boaz on December 5, 1973. Respondents thereafter appealed to the Supreme Court of Tennessee and by its opinion the Supreme Court reversed the decision of the trial judge with respect to Areas 4 and 12. The Supreme Court found that Trial Judge Boaz did not apply the proper rule of law in passing upon the facts as he found them to be from all of the evidence. Thereafter, a petition to rehear, brief and argument in support thereof and supplement thereto was filed by petitioners emphasizing the importance of the role of the trial judge in an annexation proceeding and raising the question that TCA 6-309 is a blatant violation of the one-man, one-vote principle and unconstitutional in violation of the due process and equal protection clauses of the Federal Constitution. The petition to rehear was denied on July 29, 1974, by the Supreme Court of Tennessee. Thereafter, an application for special leave to file a second petition for rehearing was filed by petitioners seeking to raise new questions relating to the importance of the role of the Trial Judge in an annexation proceeding and new issues regarding the constitutionality of the annexation statutes and ordinances passed thereunder and the action of the Supreme Court in reversing the decision of the Trial Judge. This application was denied by the Supreme Court of Tennessee in an order filed on September 23, 1974. In this order, the Supreme Court erroneously stated that all questions as to the constitutionality of the statute and of the applicable rule in passing upon the evidence were considered in the

original opinion and the petition to rehear. Further in this order, Special Justice W. M. Leech stated that the motion was not filed prior to the adjournment of court and comes too late. It's interesting to note that the opinion on the petition to rehear was not filed until August 30, 1974, and was not received by petitioners' attorney until after the adjournment of the Tennessee Supreme Court, which left no time in which to make application for special leave to file a second petition for rehearing and which marked the retirement of four of the five justices of the Court.

ARGUMENT

I

WHETHER PETITIONERS WERE DEPRIVED OF THEIR RIGHTS TO DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE SUPREME COURT OF TENNESSEE IN ITS ADOPTION OF A "FAIRLY DEBATABLE" TEST WHEN AS APPLIED BY THE SAID COURT DIMINISHES THE ROLE INTENDED BY THE TENNESSEE LEGISLATURE OF A TRIAL JUDGE IN AN ANNEXATION PROCEEDING AND IN EFFECT NULLIFIES THE LEGISLATIVE RIGHT OF PETITIONERS TO CONTEST THE VALIDITY OF AN ANNEXATION ORDINANCE.

The decision below deserves the attention of this court because due process of law protects against arbitrary action, consequently, arbitrary action by the tribunal in the hearing of a cause or in its order violates due process. *Washington, ex rel, Oregon R. & Nav. Co. v. Fairchild*, 224 U.S. 510. While the contraction of the boundaries of a municipality is essentially a legislative function, it is

subject to judicial review on the question whether there is any reasonable basis for the contraction and whether the evidence reflects public convenience and necessity. *Marshall v. Mayor & Board of Selectmen*, 382 U.S. 836. The Supreme Court has never acknowledged that the states have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities no less than other state power lies within the scope or relevant limitations imposed by the United States Constitution. *Gomillion v. Lightfoot*, 364 U.S. 339. When this Court reviews state court judgments involving constitutional issues, it "must review independently both the legal issues and those factual matters with which they are commingled." *United States v. John J. Felin & Co., Inc.*, 334 U.S. 640.

Prior to the adoption of the relevant annexation statutes in 1955, no provision existed for Tennessee municipalities to annex adjoining territory by ordinance. Before 1955, boundaries of municipalities could be extended by the Tennessee Legislature or by a vote of approval by a majority of the people in an area proposed to be annexed (referendum). In 1961, the Tennessee Legislature amended TCA 6-309 to restrict Tennessee municipalities in the exercise of their power to annex by ordinance by requiring that before any territory more than one-fourth (1/4) square mile in area or having a population of more than five hundred (500) persons may be annexed under 6-309, the governing body of the municipality shall adopt a plan of services setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. In the present cases, a plan of services was adopted under a portion of TCA 6-309, known as the variable tax act, which was declared unconstitutional by the Tennessee Supreme Court in another

case after the filing of these lawsuits. The respondents have never adopted another plan of services to conform with the remaining requirements of TCA 6-309 and petitioners contend that another reason for the invalidity of the annexation ordinances is that respondents have not complied with TCA 6-309 regarding a plan of services.

When the Tennessee Legislature extended the right to municipalities to annex by ordinance, it placed limitations upon them and provided in TCA 6-310 that any aggrieved property owner within the territory subject to annexation may file a suit in the nature of a quo warranto proceeding to contest the validity of the annexation on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the effected territory and the municipality as a whole so constituting an exercise of power not conferred by law. The Legislature further stated that the question before the court shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality. The Legislature then directed that should the court find the ordinance to be unreasonable an order shall be issued vacating the same.

The interpretation by Judge Boaz of the relevant Tennessee Code sections was correct and based precisely upon the only reasonable conclusion that could be drawn from the language appearing in such sections.

Respondents emphasized and the Tennessee Supreme Court agreed that Judge Boaz erred by substituting his opinion for that of the respondents. This is the crux of this first question presented for review. As shown, the Tennessee Legislature charged the Trial Judge in an an-

nexation proceeding with certain duties. By judicial decision and not by legislative enactment, the State of Tennessee through its Supreme Court has adopted a rule that if a "fairly debatable" question arises as to the reasonableness of an annexation ordinance that the trial judge must hold for the municipality. In the present cases, petitioners presented the most comprehensive evidence ever offered in a Tennessee annexation case against the reasonableness of the annexation ordinances.

Petitioners did not attack the concept of annexation, but proved by overwhelming evidence that the annexation of Areas 4 and 12 by the City of Chattanooga was unreasonable. After a personal tour of the areas after the completion of all the proof, Judge Boaz found the annexation of Areas 4 and 12 to be unreasonable and in accordance with TCA 6-310 vacated them. Judge Boaz performed his judicial function precisely as required under TCA 6-310 and the test adopted and unrealistically applied by the Supreme Court of Tennessee not to be found anywhere within the Tennessee annexation statutes diminishes the role of the trial judge in an annexation proceeding and effectively nullifies the right of petitioners to contest the validity of an annexation ordinance and denies them due process of law and equal protection of the laws.

This "fairly debatable" test was adopted by the Tennessee Supreme Court from the Missouri case of *City of St. Joseph v. Hankinson*, 312 S.W.2d 4. It is interesting to note, however, that in Missouri the city has the burden of proving that its resolution of annexation is reasonable and necessary to the proper development of the city. *City of Lawson v. Cates*, (App. 1972) 485 S.W.2d 146. Unlike Tennessee, in Missouri the burden of establishing the prerequisite elements of (1) the area to be annexed, (2) that such annexation is reasonable and neces-

sary to the proper development of said city, and (3) the ability of said city to furnish normal municipal services of said city to said unincorporated area within a reasonable time after said annexation is to become effective, which elements appear in 71.015 of the Missouri Code, rests on the city which seeks to annex unincorporated land. *City of Mexico v. Hodges*, (App. 1972) 482 S.W.2d 545.

A court in reaching its ultimate decision as to the reasonableness of a municipality's legislative decision with respect to a proposed annexation must consider the comparative benefits and detriments to both the annexing municipality and the area to be annexed. *Creve Coeur v. Brame*, (Mo. App.) 446 S.W.2d 173. This language squares with the role of the trial judge in an annexation proceeding as intended by the Tennessee Legislature in TCA 6-310.

Trial Judge Boaz made a personal inspection of the territories in question. The decision of a trial judge in an annexation proceeding is entitled to weight, but where he examines the locus in quo, his findings and decree are entitled to more consideration. *Portland General Electric Co. v. City of Estacada*, 194 Or. 145, 241 P.2d 1129.

Even in Tennessee the Supreme Court in *State of Tenn., ex rel, Balsinger v. Town of Madisonville*, 222 Tenn. 272, 435 S.W.2d 803, has stated that there is a statutory presumption in favor of the judgment of the trial court unless the preponderance of the evidence is otherwise, however, because of the adoption of the "fairly debatable" test and its arbitrary and unreasonable application by the Tennessee Supreme Court, the preponderance rule was ignored in the present case.

Under most statutes, the courts generally hold that the question of the reasonableness of extension of corporate limits is subject to judicial review, and if found unreasonable will be declared void. *Portland v. City of Estacada*, *supra*.

As relates to the exercise of powers, it is generally regarded that municipal corporations have none of the elements of sovereignty; that they cannot go beyond the powers granted them, and that they must exercise such granted powers in a reasonable manner. These are legal propositions well settled and are everywhere enforced by judicial judgments. *Portland v. City of Estacada*, *supra*.

In quo warranto proceedings, the relative province of court and jury is the same as in other cases and conformable to the general practice. 65 Am. Jur. 2d 308.

The record contains overwhelming proof that Area 4 is classified as a low density area and Area 12 is hardly classified even as low density, that their terrains consist of bottom land lying within flood plains, a large island known as Williams Island with no means of ingress or egress, and a great majority of land consisting of steep slopes, none of which can be developed. The few houses located in Area 12 are typical rural farm houses and what open or flat land or developmental land there might be in Area 12 represents generally acreage and farms. (BE 697, 1-7) (BE 697, 11 - BE 701, 9). In the Tiftonia-Wauhatchie area there are two major limiting geographical influences on development, being the mountains—Lookout Mountain, Elder Mountain, and Raccoon Mountain—and the Tennessee River. As a result of geography, these areas are relatively isolated from the urban area. (BE 702, 10 - BE 740, 20). Although Area 4 includes more houses than Area 12, it is a low density area, the

major part of which is also rural and agricultural. Both areas have demonstrated almost no potential for growth due to the limiting geographical features. The natural and overwhelming growth of the City of Chattanooga is in the opposite direction to that of Areas 4 and 12. (See Trial Judge's Memorandum Opinion, Appendix A hereto.)

A state statute annexing large areas of land not occupied or improved and having no reasonable relation to the respective growth of the City or to its needs or convenience was invalid. *State, ex rel, Attorney General v. Avon Park*, 108 Fla. 641, 149 So. 409; *State, ex rel, Davis v. Largo*, 110 Fla. 21, 149 So. 420.

City limits should not be so extended as to take in contiguous land (1) when they are used only for purposes of agriculture or horticulture and are valuable on account of such use; (2) when they are vacant and do not derive special value from their adaptability for city uses. *Portland v. City of Estacada, supra.*

II

WHETHER TCA 6-309, ANNEXATION BY ORDINANCE, VIOLATES THE ONE-MAN, ONE-VOTE PRINCIPLE AND IS THEREFORE UNCONSTITUTIONAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The decision below deserves the attention of this Court because petitioners are protected by the Fourteenth Amendment of the Federal Constitution from inequality of representation. *Baker v. Carr*, 369 U.S. 186. To the extent that TCA 6-309 permits municipal officials to enact ordinances that directly affect a large segment of citizens who have had no right to participate in their election, it blatantly violates the one-man, one-vote principle.

In *Gray v. Sanders*, 372 U.S. 368, the Court stated that once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and *wherever their home may be in that geographical unit*. This is required by the equal protection clause of the Fourteenth Amendment. (Emphasis supplied.) The petitioners of Areas 4 and 12 did not even have one vote much less an equal vote in the election of the municipal officials of the City of Chattanooga, but are the ones most effected by their action. Petitioners of Areas 4 and 12 are being governed by elected officials whose election they have not participated in, which clearly demonstrates an unjustifiable inequality of representation as compared to those citizens who so participated who comprise a much larger group. Legislative control of municipalities no less than other state power lies within the scope of relevant limitations imposed by the United States Constitution. The opposite would sanction the achievement by a state of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence. *Baker v. Carr, supra.*

III

WHETHER THE PETITIONERS' RIGHTS TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THEIR RIGHTS UNDER THE FIFTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THEY WERE DENIED THE RIGHT TO OFFER EVIDENCE OF A PRECONCEIVED AND UNCONSTITUTIONAL PLAN TO DILUTE THE VOICE AND INFLUENCE OF THE BLACK CITIZENS WITHIN THE CITY OF CHATTANOOGA.

The decision below deserves the attention of this Court because originally both of these cases included two black petitioners who resided within the existing municipal boundaries of the City of Chattanooga. The complaints of both cases alleged that the annexation of Areas 4 and 12 was preconceived to dilute the voice and influence of the black citizens and property owners within the present boundaries of the respondent by extending its boundaries to include areas marked by an absence of black residents and that as such said ordinances discriminate against the black citizenry of the City of Chattanooga and constitutes a violation of the Fourteenth Amendment of the United States Constitution. As stated, these cases are suits in the nature of quo warranto proceedings and the quo warranto statute of Tennessee, TCA 23-2801, is therefore applicable and provides:

> Grounds for Action. An action lies in the name of the state against the person or corporation offending in the following cases:
>
> (5) or exercise powers not conferred by law.

Trial Judge Boaz held that the two black petitioners were improper parties because they were not aggrieved owners

of property lying within the territory proposed to be annexed. Said black petitioners and the remaining petitioners were, therefore, denied due process of law by being prevented from offering evidence to prove a preconceived and unconstitutional plan to dilute the voice and influence of the black citizens within the existing municipal boundaries of the City of Chattanooga.

Prior to the annexation of some 32,000 people at one time, black citizens comprised almost 50 percent of the total population of the City of Chattanooga. Areas 4 and 12 have no black residents.

A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the Legislature is a redefinition of municipal boundaries. *Gomillion v. Lightfoot, supra.* The Fifteenth Amendment nullifies sophisticated as well as simple-minded modes of discrimination. *Lane v. Wilson,* 309 U.S. 268; *Gomillion v. Lightfoot, supra.*

CONCLUSION

Petitioners spent many hours in preparing their cases and their proof was directly related to the question of whether the proposed annexations be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territories sought to be annexed and the citizens and property owners of the municipality. A professional urban planner and a traffic engineer with a Master's Degree in Transportation Planning testified as expert witnesses for the petitioners. For the first time in a Tennessee annexation case, the petitioners through the testimony of the urban planner provided a realistic definition of the terms: health,

safety and welfare. An exhaustive cost revenue analysis of Areas 4 and 12, as well as of the City of Chattanooga, was offered through the testimony of the Transportation Planning expert. Both expert witnesses concluded that the annexation of Areas 4 and 12 was clearly unreasonable based upon the city's past performance, its demonstrated capabilities and the needs and characteristics of Areas 4 and 12, as well as of the City of Chattanooga. Respondents offered no proof to contradict the testimonies of these two expert witnesses by any member of the staff of its municipal engineering consultant. Petitioners did not conduct an attack upon the principle of annexation, but proved by overwhelming evidence that the annexation of Areas 4 and 12 was arbitrary and unreasonable. It has been noted that four separate cases were consolidated for trial purposes and that the trial judge after personally touring the areas concluded against the respondents in the cases involving Areas 4 and 12, and in favor of the respondents in the cases involving the other two areas. In his memorandum opinion, Judge Boaz summarized the general evidence offered by respondents that municipal services could be provided to all of the four areas. The Supreme Court of Tennessee referred to this summary to support its decision to reverse the lower trial court because of the "fairly debatable" test. Petitioners proved, however, that Areas 4 and 12 already had sufficient services which were comparable or better than those services offered by respondents; and that within the definition of health, safety and welfare, petitioners occupied a better position than did residents of the City of Chattanooga. Petitioners further proved that the major portions of their respective areas were undevelopable due to the vast lands lying within flood plains, steep terrain, a 400-acre island with no means of ingress and egress and imperfect soil characteristics prohibiting the installation of a sewer

system, increased traffic facilities and residential or industrial development. Although no demand for a need of the installation of a sewer system was indicated, it was shown that Areas 4 and 12 were considered as low priority areas even by the City of Chattanooga on their time table for receiving sewers. In fact, it was shown that it was not at all feasible in Area 12 to install a sewer system because the homes therein being farm houses widely separated from each other. It was further shown that the only feasible way to provide sewer services to Areas 4 and 12 was by the installation of sewer lines under the Tennessee River (which might never be accomplished because of problems related to environmental regulations). The proof offered by respondents did not contradict the specific proof of petitioners relating to Areas 4 and 12. Petitioners insist that because they specifically complied with TCA 6-310 and overwhelmingly proved the unreasonableness of the annexation of their areas, and the finding of the trial judge that such annexation was, in fact, unreasonable, and in view of the proof offered by respondents consisting of only theoretical statements in support of annexation in general, but not specifically relevant to Areas 4 and 12 and the resulting arbitrary action by the Supreme Court of Tennessee in reversing the lower court's decision respecting Areas 4 and 12 based upon the "fairly debatable" rule, petitioners were deprived of the due process of law and equal protection of the laws.

For all of the foregoing reasons, including the arguments respecting the second and third questions presented for review, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS H. O'NEAL
808 Maclellan Building
Chattanooga, Tennessee 37402
Telephone: 615/756-5111

Attorney for Petitioners

APPENDIX A

[fol. 1]

IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE

State of Tennessee, ex rel Otis O'Dell, et al vs. City of Chattanooga, et al	No. N-16198
State of Tennessee, ex rel Robert J. Hicks, et al vs. City of Chattanooga, et al	No. N-16199
State of Tennessee, ex rel James W. Hartley, et al vs. City of Chattanooga, et al	No. N-16202
State of Tennessee, ex rel Nell Johns, et al vs. City of Chattanooga, et al	No. N-16209

MEMORANDUM

(Filed July 6, 1973)

The above four quo warranto cases contesting the validity of ordinances purporting to annex certain areas to the

City of Chattanooga were consolidated and heard at the same time. The undersigned was designated by the Chief Justice of the Supreme Court of Tennessee, to hear the cases. Oral proof was heard from March 19, 1973, through March 28, 1973, and, by agreement, the proposed areas were toured by the Court and counsel on March 29, 1973. The matter was then taken under advisement pending receipt of briefs and written arguments.

The complaint in each case is filed under Tennessee Code Annotated, Section 6-310, which sets out the procedure to follow in contesting annexation by a municipal authority. The pleadings in these cases and the general order of proof were as follows:

[fol. 2] TIFTONIA

State of Tennessee, ex rel Otis O'Dell, Number N-16198, contested the validity of ordinance number 6397, adopted by the City of Chattanooga, this ordinance purporting to annex an area to the west of the present city boundaries, commonly known as Tiftonia, and identified on Exhibit 1, a map of the Study Area Boundaries, as area number 4; and ordinance number 6398, purporting to provide for a plan of taxation for area 4, annexed by ordinance number 6397. Plaintiffs also contend that Resolution number 9168, purporting to adopt a plan of services for this area is invalid.

WAUHATCHIE

In the case of State of Tennessee, ex rel Robert J. Hicks vs. City of Chattanooga, et al, number N-16199, the complaint proposes to contest the validity of ordinance number 6393, which purports to annex to the City of Chattanooga an area lying west of the City and north, west and

south of Tiftonia, referred to as Wauhatchie and identified on the Study Area Boundaries (Exhibit 1) as area 12; and ordinance number 6394 purporting to provide a plan of taxation for area 12 as annexed by ordinance number 6393. Plaintiffs also contend that Resolution No. 9166, purporting to adopt a plan of services for this area is invalid.

NORTH MOUNTAIN CREEK

The case of State of Tennessee, ex rel James W. Hartley vs. City of Chattanooga, et al, number N-16202, complained that ordinance number 6395 purporting to annex certain areas located northwardly from the present City of Chattanooga and ordinance number 6396 providing for taxation of the area shown on the Study Area Boundaries (Exhibit 1) as 13A, and resolution number 9167 providing for the services to be furnished the area known as 13A are invalid and amount to an arbitrary and oppressive abuse of power delegated to the City of Chattanooga by the Tennessee Legislature.

[fol. 3] EAST BRAINERD

The case of State of Tennessee, ex rel Nell Johns, et al vs. City of Chattanooga, et al, number N-16209, complains that ordinance number 6389 purporting to annex a certain area eastwardly from the City of Chattanooga, known as East Brainerd and referred to on the Study Area Boundaries Map (Exhibit 1) as 9B, is invalid, along with ordinance number 6390 providing for taxation, and resolution number 9164 providing for a plan of services for the area.

In each of the above cases it was complained that various specified sections of the state constitution and the federal constitution had been violated in the manner in

which the city purported to carry out the annexations involved. Annexation of territory by a municipal corporation is a legislative function; a municipality can only extend its boundaries and annex territory in strict accordance with the state statutes that provide for it. The Court holds that the plaintiffs have failed to show any constitutional infirmities in the procedures followed by the defendant City.

Municipal corporations in Tennessee are allowed to change their boundaries provided they comply with Tennessee Code Annotated, Sections 6-303 through 6-321. In TCA, Section 6-309 it is provided that a municipality upon its own initiative "when it appears that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered, after notice and public hearing, by ordinance, may extend its corporate limits by annexation of such territory adjoining its existing boundaries as may be deemed necessary for the welfare of the residents and property owners of the affected territory as well as the municipality as a whole..." This statute also provides that the municipality must first adopt a plan of services

[fol. 4] setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. It is also required that before any such plan of services shall be adopted it must have been submitted to the local Planning Commission, if available, for study and a written report rendered within a specified time.

Under TCA, Section 6-310 the method of contesting any such proposed annexation is outlined and it is provided that any aggrieved owner of property lying within the pro-

posed annexation may file a quo warranto proceeding to contest the validity thereof on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the affected territory and municipality as a whole and so constitutes an exercise of power not conferred by law. It is further provided that the issue shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality. If the Court before whom the matter is heard finds the ordinance to be unreasonable it may be vacated and in the absence of such finding an order shall be issued sustaining the validity of such ordinance.

Historically, municipalities have found it necessary to expand their city boundaries, and that is why the Legislature has adopted statutes setting out the procedure to be followed.

The growth pattern of the City of Chattanooga, as in many other cities in the past few decades, reflects a move by many people to the suburbs. Thus, proof shows that Hamilton County in 1950, had a population of 208,255 and in 1970, the population was 255,007. The City of Chattanooga had a population in 1950, of 131,041 and yet in 1970, its population had decreased to 119,923. Certain segments of the population, referred to as the middle class, move out of the city and the city loses their support and their participation in the tax structure.

[fol. 5] Therefore, without going into great detail, it clearly appears that the City of Chattanooga has found it necessary to expand its boundaries. The determination of this question, as provided by the State Legis-

lature, is a legislative function of the city. The question before the Court is as to its reasonableness.

In general, as to the four areas to be annexed, it was shown by the plaintiffs that the county was able to provide health services, a planning commission, police protection through its Sheriff's Department, pollution control, a land-fill operation, county roads and county schools, that water and electricity were available, that septic tanks were reasonably efficient, that private garbage collection and fire protection were available, that some recreational facilities were available, and that the health safety and welfare of the citizens of these areas was not endangered and that the prosperity of the residents of the affected areas and the municipality would not be materially retarded if the annexation were not permitted. The plaintiffs' proof was that the city had failed adequately to provide the services mentioned within the present city and that it would not be financially able to provide the services to the annexed areas; that, consequently it would be unfair to raise their taxes for services not received. It was, therefore their position that annexation of these four areas was unreasonable under all the circumstances.

On the other hand, it was shown by the city that the areas in question had no fire protection comparable to what the city could offer (and ultimately a lowering of insurance rates), that the city could provide better police protection, and that the schools would have available more funds, with a smaller teacher-pupil ratio, that the health of these areas was endangered due to percolation problems with regard to septic tanks and that the county had never provided sanitary sewers, whereas the city could, that the county does not provide refuse and garbage collection, nor recreational facilities, nor street lighting,

[fol. 6] nor traffic engineering, nor certain inspection services, which services could and would be provided by the city. Further, that the vast majority of the people in the proposed areas work in the city, that their economic opportunities were provided by the city, that recreational facilities were provided and could be better provided by the city, that the airport was provided by the city, that cultural advantages were provided by the city and utilized by county residents and that it was necessary and right that the tax burden for all such services be equitably distributed. It was shown that the city was financially able to and would provide the usual municipal services in accordance with the schedule of services, or before the dates scheduled.

The city especially contends that it was necessary and proper for the annexed areas to become a part of the city in order to insure the future orderly and planned growth of the city.

The city's position was that the proposed annexations were a reasonable exercise of the legislative authority delegated to the municipality by the Legislature.

It appears to the Court that TCA, Section 6-309 provides a guideline to the legislative body of the municipality by providing that it determine that the prosperity of the municipality and proposed annexed area will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered unless annexation takes place and if the procedure therein outlined is followed then under Section 6-310, if the annexation is contested, it becomes a judicial function to determine whether the annexation is reasonably necessary for the welfare of the residents and property owners of the affected territory and the municipality as a whole, giving consideration to the health, safety

and welfare of the citizens and property owners of both the territory sought to be annexed and the citizens and property owners of the municipality. The burden of proof would be upon the plaintiffs to show by a preponderance of the proof that the proposed annexation was unreasonable.

[fol. 7] Except as mentioned below, it appears to the Court, after hearing all of the proof, reviewing the exhibits and after considering the entire matter, that the plaintiffs have failed to show that the proposed annexation of North Mountain Creek (area 13A) and East Brainerd (area 9B) is an unreasonable and arbitrary exercise of the legislative authority delegated to the municipality by the Legislature of the State of Tennessee. It is the opinion of the Court that it is not unreasonable for the City of Chattanooga to annex the North Mountain Creek area and the East Brainerd area in view of the proof of the ability of the city to provide the usual municipal services and especially in view of the overwhelming proof that the city's natural growth is to the north and the east. It is only right and proper that these areas be annexed in order to provide for the orderly future growth of the City of Chattanooga. It is, however, the opinion of the Court that it would be an unreasonable exercise of the legislative function delegated to the City of Chattanooga by the Legislature of the State of Tennessee to allow the annexation of Tiftonia and Wauhatchie in view of the proof mentioned above, that is, that the natural growth of the city is to the north and east. Tiftonia and Wauhatchie are separated from the City of Chattanooga by the Tennessee River and by Lookout Mountain and are natural communities within themselves and are somewhat "isolated" from the city. There was virtually no proof of any relationship between the natural growth of the City of Chattanooga and the land

area to the west of the city, and, consequently, no proof that it would be necessary to plan the development of these areas for the future orderly development of the city. There was proof that the construction of I-24 had made these areas more easily accessible to the city of Chattanooga but there was also proof that one of the principal arteries for transportation from this area was along the Cummings Highway which passes through a county area before getting into the areas known as Tiftonia and Wauhatchie. The welfare of the residents and property owners of Tiftonia and Wauhatchie, as well as the City of Chattanooga, would not, in the Court's opinion, be adversely affected if the annexation of the two areas was not consummated. In view of the above findings and after giving due consideration to the topography and [fol. 8] geographic features of the two areas as related to the City, the annexation of Tiftonia and Wauhatchie cannot reasonably be justified at this time, and it is the Court's opinion that annexation would be unreasonable under the circumstances. The mere fact that a city can provide certain municipal services and could use more residential and industrial lands would not justify annexation.

In view of this decision an order should be prepared vacating city ordinances number 6397, 6398, and resolution 9168, which concern the annexation of Tiftonia, and also vacating the resolutions with regard to Wauhatchie, being number 6393, 6394 and resolution number 9166. The order should also reflect that the Court sustains the validity of the ordinances with regard to North Mountain Creek, that is number 6395 and 6396 and resolution number 9167, and with regard to East Brainerd, that is ordinance number 6389 and 6390 and resolution number 9164.

An order will be prepared by counsel for the City of Chattanooga reflecting the decision of the Court with regard to these four consolidated cases, preserving therein the right to an appeal by the adversely affected parties.

This 3rd day of July, 1973.

/s/ Sam E. Boaz
Judge by Designation

APPENDIX B

[fol. 1] IN THE CIRCUIT COURT
OF
HAMILTON COUNTY, TENNESSEE

State of Tennessee, ex rel Otis O'Dell, et al vs. City of Chattanooga, et al	No. N-16198
State of Tennessee, ex rel Robert J. Hicks, et al vs. City of Chattanooga, et al	No. N-16199
State of Tennessee, ex rel James W. Hartley, et al vs. City of Chattanooga, et al	No. N-16202
State of Tennessee, ex rel Nell Johns, et al vs. City of Chattanooga, et al	No. N-16209

AMENDMENT TO MEMORANDUM

(Filed July 23, 1973)

The memorandum heretofore filed in these consolidated causes on July 6, 1973, is hereby amended by striking the

second sentence in the first paragraph of page 7 and substituting in lieu thereof the following:

It is the opinion of the Court that it is not unreasonable for the City of Chattanooga to annex the North Mountain Creek area and the East Brainerd area in consideration of the health, safety and welfare of the citizens and property owners, both of the city and of the territories being annexed, and in view of the proof of the ability of the city to provide the usual municipal services, and especially in view of the overwhelming proof that the city's natural growth is to the north and east.

This July 21, 1973.

/s/ Sam E. Boaz
Judge by designation

APPENDIX C

[fol. 1]

IN THE CIRCUIT COURT
OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE, ex rel, OTIS O'DELL, et al vs. CITY OF CHATTANOOGA, et al	No. N-16198
STATE OF TENNESSEE, ex rel, ROBERT J. HICKS, et al vs. CITY OF CHATTANOOGA, et al	No. N-16199
STATE OF TENNESSEE, ex rel, JAMES W. HARTLEY, et al vs. CITY OF CHATTANOOGA, et al	No. N-16202
STATE OF TENNESSEE, ex rel, NELL JOHNS, et al vs. CITY OF CHATTANOOGA, et al	No. N-16209

FINAL DECREE
(INCORPORATES AMENDMENT TO MEMORANDUM)

These causes came on to be heard from March 19, 1973, through March 29, 1973, before the Honorable Sam Boaz, Judge of Law and Equity, sitting specially, having been

designated by the Chief Justice of the Supreme Court of Tennessee to hear these cases. Said causes, having been consolidated for trial purposes, came on to be heard upon the original complaints, the answers of defendants, testimony of witnesses in open court, a tour of the areas to be annexed by the court and counsel, and the entire record as a whole, from all of which the Court is of the opinion, for the reasons stated in its Memorandum Opinion, filed July 6, 1973, and its Amendment to Memorandum filed July 23, 1973, which are hereby ordered
[fol. 2] incorporated herein and made a part hereof by reference, and which are directed to be made a part of the record of these causes, that the annexation of the areas known as 13-A, being the North Mountain Creek area, and 9-B, being the East Brainerd area, by the City of Chattanooga, is not unreasonable in consideration of the health, safety and welfare of the citizens and property owners, both of the city and of the territories being annexed, and in view of the proof of the ability of the City to provide the usual municipal services, and especially in view of the overwhelming proof that the city's natural growth is to the north and east, and the validity of the ordinances annexing said areas should be sustained. Further, for the reasons set forth in the Memorandum Opinion filed July 6, 1973, the Court is of the opinion that the ordinances annexing the areas known as Area 4, Tiftonia, and Area 12, Wauhatchie-Williams Island, are unreasonable and should be vacated.

It is therefore, ORDERED, ADJUDGED and DECREED by the Court:

1. That Ordinances No. 6389 and 6395 of the City of Chattanooga, Tennessee, annexing the areas referred to as East Brainerd and North Mountain Creek, along with

Ordinances No. 6390 and 6396, providing for taxation thereof, and Resolutions No. 9164 and 9167, providing for Plans of Services, be and hereby are declared valid and the same are hereby in all respects sustained.

2. That, as provided by Tennessee Code Annotated Section 6-310, said ordinances shall become operative thirty-one (31) days after the entry of this Decree.

3. That Ordinances No. 6393 and 6397 of the City of Chattanooga, Tennessee, be and are hereby de-
[fol. 3] clared unreasonable, and the same shall be vacated, along with Ordinances No. 6394 and 6398, providing for taxation, and Resolutions No. 9166 and 9168, providing Plans of Services.

4. That the costs of Cases No. 16198 and 16199 are adjudged against the defendant City of Chattanooga, and the costs of Cases No. 16202 and 16209 are adjudged against the respective Relators and the sureties on their costs bonds, and for the collection of which execution may issue.

To the actions of the Court in Cases No. 16202 and 16209, in sustaining the validity of the ordinances and resolutions annexing the East Brainerd and North Mountain Creek areas, and to the adverse facts of this Final Decree, the respective Relators excepted, and now except, and pray for an appeal to the next term of the Supreme Court sitting at Knoxville, which appeal is hereby granted upon their perfecting an appeal as required by law.

To the actions of the Court in Cases No. 16198 and 16199, in declaring the ordinances and resolutions annexing Tiftonia and Wauhatchie-Williams Island unreasonable and vacating the same, and to the adverse facts of this Final Decree, the defendant, City of Chattanooga, et al,

excepted, and now except, and pray for an appeal to the next term of the Supreme Court, sitting at Knoxville, which appeal is hereby granted upon their perfecting an appeal as required by law.

This the ____ day of _____, 1973.

_____
JUDGE

APPROVED FOR ENTRY:

_____
Counsel for Otis O'Dell, et al

_____
Counsel for Robert J. Hicks, et al

[fol. 4]

_____
Counsel for James W. Hartley, et al

_____
Counsel for Nell Johns, et al

_____
Counsel for City of Chattanooga, et al

APPENDIX D

[fol. 1]

CITY OF CHATTANOOGA,
TENNESSEE, ET AL,
Appellant

VS.

STATE OF TENNESSEE, EX REL,
ROBERT J. HICKS, ET AL,
Appellee

CITY OF CHATTANOOGA,
TENNESSEE, ET AL,
Appellant

VS.

STATE OF TENNESSEE, EX REL,
OTIS O'DELL, ET AL,
Appellee

HAMILTON COUNTY LAW,
Honorable Sam E. Boaz,
Judge

For the Appellant:

Eugene N. Collins,
Chattanooga, Tennessee.

Randall L. Nelson,
Chattanooga, Tennessee.

For Appellee:

Thomas H. O'Neal,
Chattanooga, Tennessee.

OPINION

(Filed July 29, 1974)

In 1971, the City of Chattanooga initiated by ordinances the annexation of several adjacent areas of the City, and upon final passage of the ordinances, actions were brought in the Courts of Hamilton County "in the nature of quo

warranto" by residents of the various areas. Four of said suits were brought in the Circuit Court of Hamilton County, and in the various suits they are referred by areas as follows: Case Number N-1619, "Tiftonia"; Case Number N-16199, "Wauhatchie"; Case Number N-16202, "North Mountain Creek"; and Case Number N-16209 as "East Brainerd". For the purpose of a hearing these four cases were consolidated, and were heard by Honorable Sam E. Boaz, as Special Judge by designation of the Chief Justice of the Tennessee Supreme Court. Oral proof on the questions raised was heard from March 19, 1973 through March 28, 1973. In a memorandum opinion, the Court vacated the ordinances annexing the areas known as "Tiftonia" and "Wauhatchie", and the City appealed. The trial judge sustained the ordinance annexing the areas of "North Mountain Creek" and "East Brainerd" and the plaintiffs have appealed. In this opinion only the action of the trial judge in vacating the ordinances applying to "Tiftonia" and "Wauhatchie" is involved, and the City has filed in each case identical assignments of error as follows:

[fol. 2]

"I. The lower court erred as a matter of law in holding that the plaintiffs (relators) had only to show by a preponderance of the proof that the proposed annexation was unreasonable.

"II. The lower court erred in substituting its opinion of reasonableness for that of the Board of Commissioners, the legislative body of the City of Chattanooga.

"III. The lower court erred by failing to sustain the annexation ordinance, the appellants having introduced enough evidence to preponderate against the judgment below and to make, at the very least, a reasonably debatable question as to the reasonableness of the annexation."

Appendix D

The trial judge in his memorandum summarized the testimony as follows:

"In general, as to the four areas to be annexed, it was shown by the plaintiffs that the county was able to provide health services, a planning commission, police protection through its Sheriff's Department, pollution control, a landfill operation, county roads and county schools, that water and electricity were available, that septic tanks were reasonably efficient, that private garbage collection and fire protection were available, that some recreational facilities were available, and that the health, safety and welfare of the citizens of these areas was not endangered and that the prosperity of the residents of the affected areas and the
[fol. 3] municipality would not be materially retarded if the annexation were not permitted. The plaintiff's proof was that the city had failed adequately to provide the services mentioned within the present city and that it would not be financially able to provide the services to the annexed areas; that, consequently it would be unfair to raise their taxes for services not received. It was, therefore their position that annexation of these four areas was unreasonable under all the circumstances.

"On the other hand, it was shown by the city that the areas in question had no fire protection comparable to what the city could offer (and ultimately a lowering of insurance rates), that the city could provide better police protection, and that the schools would have available more funds, with a smaller teacher-pupil ratio, that the health of these areas was endangered due to percolation problems with regard to septic tanks and that the county had never provided sanitary sewers, whereas the city could, that the county does not provide

refuse and garbage collection, not recreational facilities, nor street lighting, nor traffic engineering, nor certain inspection services, which services could and would be provided by the city. Further, that the vast majority of the people in the proposed areas work in the city, that their economic opportunities were provided by the city, that recreational facilities were provided and could be better provided by the city, that the airport was provided by the city, that cultural advantages were provided by the city and utilized by county residents and that it was necessary and right that the tax burden for all such services be equitably distributed. It was shown that the city was financially able to and would provide the usual municipal services in accordance with the schedule of services, or before the dates scheduled."

Here we should observe in this opinion that we will consider only the action of the trial judge holding these ordinances invalid because "[T]he welfare of the residents and property owners of Tiftonia and Wauhatchie, as well as the City of Chattanooga, *would not, in the Court's opinion*,

[fol. 4] be adversely affected if the annexation of the two areas was not consummated". (Emphasis added.)

Immediately preceding the summary of the evidence, the trial judge made the following observation:

"Historically, municipalities have found it necessary to expand their city boundaries, and that is why the Legislature has adopted statutes setting out the procedure to be followed.

"The growth pattern of the City of Chattanooga, as in many other cities in the past few decades, reflects a move by many people to the suburbs. Thus, proof

shows that Hamilton County in 1950, had a population of 208,255 and in 1970, the population was 255,007. The City of Chattanooga had a population in 1950 of 131,041 and yet in 1970, its population had decreased to 119,923. Certain segments of the population, referred to as the middle class, move out of the city and the city loses their support and their participation in the tax structure. Therefore, without going into great detail, it clearly appears that the City of Chattanooga has found it necessary to expand its boundaries. *The determination of this question, as provided by the State Legislature, is a legislative function of the city. The question before the Court is as to its reasonableness.*" (Emphasis added.)

In all of these annexation cases now before this Court, including a companion case appealed from the Chancery Court of Hamilton County, the procedure followed by the City prior to passage of the final ordinances was the same. In each case the plans of services were based upon a comprehensive study of all areas surrounding and adjacent to the City of Chattanooga. In the companion case from the Chancery Court of Hamilton County, styled *State of Tennessee, Ex Rel, Lucius P. Hodson, et al*, we have today released an opinion wherein the procedure followed by the City prior to the final passage of the ordinances was discussed and held to be in compliance with the statutory provisions. All constitutional questions which could be raised were presented in that case and found to be without merit. Thus in these cases, we have before
[fol. 5] us only one question which will dispose of all of the assignments of error. Did the trial judge apply the proper rule of law in passing upon the facts as he found them to be from all of the evidence?

In *Morton v. Johnson City*, 206 Tenn. 411, 333 S.W.2d 924, (1960), this Court cited with approval the language of the Supreme Court of Missouri in the case of *City of St. Joseph v. Hankinson*, 312 S.W. 2d 4, as follows:

> "* * * the court does not, in any sense, substitute its discretion or judgment as to the advisability or propriety of the annexation for that of the legislative body of the city, and that it does not review the legislative discretion; *its consideration of 'reasonableness' is confined to a determination of whether there exists a sufficient showing of reasonableness to make that question, at the least, a fairly debatable one*; if there is such, then the discretion of the legislative body is conclusive. Citing authorities." (Emphasis added.)

Since *Morton*, that rule has been uniformly and consistently followed by the Courts of Tennessee. In the recent case of *State Ex Rel, Wood, et al v. City of Memphis*, (Released for publication on June 3, 1974), ___ S.W.2d ___ (Tenn. 1974), we quoted from *State Ex Rel v. City of Columbia*, 208 Tenn. 59, 343 S.W.2d 888 (1961), as follows:

> "In the outset it might not be amiss to say that annexation by city ordinance under this statute contains no trick or gimmick. It is just the Legislature conferring the right upon the city fathers to annex under the conditions prescribed in the statute. This right of annexation, aside from the statute, would be in the Legislature, and the Legislature having the right to annex has likewise the right to confer this power upon the city fathers, and it seems to us perfectly obvious that the city fathers would know far more about the needs and necessity of annexation than would the Legis-

[fol. 6] lature. The reasons therefor are so obvious that it isn't necessary for us to express them. This being true, such an annexation, so long as it complies with the statute, has the same force and effect and is subject to the same attacks only as annexation would be if done by the Legislature."

In the *Memphis* case we also said:

"It is obvious that in the annexation of territory, someone must fix the boundaries, and whether said boundaries are fixed pursuant to the annexation statute contained in T.C.A. § 6-309 or directly by the legislature, *it remains a legislative matter and will not be disturbed by this Court unless the action was arbitrary and unreasonable.* On the question of reasonableness, we realize that in every annexation case there are both advantages and disadvantages to annexation. Nevertheless, if a debatable question exists as to whether the advantages outweigh the disadvantages, then the court must rule in favor of the annexation. Stated another way, if the reasonableness of the annexation is a debatable question, then the court will uphold the validity of the annexation." (Emphasis added.)

The appellees, plaintiffs below, cite the case of *State Ex Rel, Cope, et al v. Mayor and Board of Aldermen of the Town of Morristown*, 218 Tenn. 593, 404 S.W.2d 798 (1966), and state on page seven (7) of their brief that, "the Tennessee Supreme Court affirmed the judgment of the Chancellor who found an annexation ordinance by the Town of Morristown was not reasonable, but was an arbitrary and oppressive exercise of delegated legislative power." This is an erroneous statement. That case was an appeal from the Circuit Court of Hamblen County, upholding the annexation ordinance. A jury was empaneled in that case

and at the conclusion of all of the evidence, both for and against the annexation, the judge withdrew the issues from the jury. In sustaining the lower court, this Court speaking through Mr. Justice Creason, said: "From this record it is obvious that the trial judge concluded, [fol. 7] on the evidence, that a fairly debatable question was posed as to the reasonableness of the ordinance. Equally obvious is the fact that Judge Todd was applying the rationale of the opinion of this Court in *Morton v. Johnson City*, 206 Tenn. 411, 333 S.W.2d 924 (1960). In our view the trial court properly applied the rule announced in that opinion."

The summary of the evidence as hereinafore copied from the trial judge's memorandum, shows that the question before the legislative body, exercising the power delegated to it by statute, raised a fairly debatable question. In other words, the City's legislative body did not act arbitrarily and in excess of its legislative powers by annexing the territories herein involved. Moreover, where the preponderance of the evidence lies is not the test in annexation cases, but rather the test is whether a fairly debatable question as to the reasonableness of the annexation exists. In view of our holding herein, it necessarily follows that the Chancellor's decree is reversed as to the areas of "Tiftonia" and "Wauhatchie" and these cases are remanded back to the trial court for disposition consistent with this opinion.

/s/ W. M. Leech
W. M. LEECH, SPECIAL JUSTICE.

CONCURRING:
DYER, C.J.,
CHATTIN, J.,
McCANLESS, J.,
FONES, J.

APPENDIX E

[fol. 1]

CITY OF CHATTANOOGA,
TENNESSEE, ET AL,
Respondent

VS.

STATE OF TENNESSEE, EX REL,
ROBERT J. HICKS, ET AL,
Petitioner

CITY OF CHATTANOOGA,
TENNESSEE, ET AL,
Respondent

VS.

STATE OF TENNESSEE, EX REL,
OTIS O'DELL, ET AL,
Petitioner

HAMILTON COUNTY LAW,
Honorable Sam E. Boaz,
Judge

For Petitioner:

Eugene N. Collins,
Chattanooga, Tennessee.

Randall L. Nelson,
Chattanooga, Tennessee.

For Respondent:

Thomas H. O'Neal,
Chattanooga, Tennessee.

OPINION ON PETITION TO REHEAR

(Filed August 30, 1974)

In this cause petitioners have filed an earnest petition to rehear and cite and rely upon the case of *State Ex Rel, Spoone v. Mayor and Board of Aldermen of the Town of*

Morristown, 222 Tenn. 21, 431 S.W.2d 827 (1968). In our original opinion we were fully aware of the holding in the *Spoone* case and since that case only reasserted the "fairly debatable" rule pronounced in *Morton v. Johnson City*, 206 Tenn. 411, 333 S.W.2d 924 (1960), we deemed it unnecessary to discuss that case.

In the *Spoone* case, the lower court found "that the ordinance was so palpably unreasonable and unnecessary as to be an *arbitrary and oppressive exercise of dele-*
[fol. 2] *gated legislative power.*" (Emphasis added.) In affirming the lower court in that finding, it was pointed out that the advantages testified to by the Town's witnesses were not directed to the specific area sought to be annexed, which was not a densely populated area.

In the case subjudice conflicting evidence as to the necessity of annexation was to the specific area and was of such a nature and volume as to raise a fairly debatable question. The trial judge's finding of fact also shows this to be the case. The trial judge did not find that the legislative action of the City "was palpably unreasonable and unnecessary as to be an arbitrary and oppressive exercise of delegated legislative power."

We held in our original opinion that the trial judge did not apply to the evidence the legal test prescribed by *Morton*, and after a careful review of the record and the authorities cited, we reaffirm that holding.

All other questions presented in the petition to rehear were fully covered in our original opinion and since several cases were involved the record was carefully read on the original hearing and we have reviewed our original notes and authorities and again hold that the trial judge

did not apply the proper rule of law in passing upon the facts as he found them. The evidence introduced as to these two areas presented a fairly debatable question and was therefore a legislative matter.

The petition to rehear is denied.

/s/ W. M. Leech
W. M. LEECH, SPECIAL JUSTICE.

CONCURRING:
DYER, C.J.,
CHATTIN, J.,
McCANLESS, J.,
FONES, J.

APPENDIX F

[fol. 1]

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

STATE OF TENNESSEE, EX REL
OTIS O'DELL, ET AL
Appellee

V.

CITY OF CHATTANOOGA,
TENNESSEE, ET AL
Appellant

NO. 89
HAMILTON COUNTY LAW

STATE OF TENNESSEE, EX REL
ROBERT J. HICKS, ET AL
Appellee

V.

CITY OF CHATTANOOGA,
TENNESSEE, ET AL
Appellant

NO. 90
HAMILTON COUNTY LAW

ORDER

(Filed September 23, 1974)

A motion for leave to file a second petition to rehear has been filed by the plaintiffs in the above cause. The application for special leave cites no new grounds that have not been determined, either in this case or the companion cases from the Circuit and Chancery Courts of Hamilton County. The questions as to the constitutionality of the statute are similar to those which were raised in the

Chancery Court case of State, ex rel Hodson, which was decided adversely to the contention of the plaintiffs in an opinion by Mr. Justice Chattin on July 29, 1974, and also contains the same question that was decided in the case of State ex rel Wood v. City of Memphis, an opinion which was released on June 3, 1974. All questions as to the constitutionality of the statute and of the applicable rule in passing upon the evidence were considered in the original opinion and the petition to rehear, and since no new authorities or statement of authorities overlooked in these cases have been presented to the Court in the motion. The application for permission to file a second petition to rehear is denied. The motion also was not filed prior to the adjournment of Court and comes too late.

/s/ W. M. Leech
W. M. LEECH, Special Justice

APPENDIX G

TENNESSEE CODE ANNOTATED

* * *

6-309. Annexation by ordinance. -- A municipality when petitioned by a majority of the residents and property owners of the affected territory, or upon its own initiative when it appears that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered, after notice and public hearing, by

ordinance, may extend its corporate limits by annexation of such territory adjoining its existing boundaries as may be deemed necessary for the welfare of the residents and property owners of the affected territory as well as the municipality as a whole, provided said ordinance shall not become operative until thirty (30) days after final passage thereof.

Provided, however, that before any territory more than one-fourth (1/4) square mile in area or having a population of more than five hundred (500) persons may be annexed under this section, the governing body of the municipality shall adopt a plan of service setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. Provided, further, that before any such plan of service shall be adopted, it must have been submitted to the local planning commission, if there be such, for study and a written report, to be rendered within ninety (90) days after such submission, unless by resolution of the governing body a longer period is allowed.

Anything contained in chapter 3 of title 6 to the contrary notwithstanding, a municipality in any county having a population of over sixty-six thousand (66,000) (except in those counties having a population of more than seven hundred thousand (700,000) according to the United States census of population of 1970 or any subsequent federal census; or in those counties which have the metropolitan form of government) shall have the supplemental right and authority to annex upon its own initiative by ordinance any territory without levying any municipal ad valorem taxes except for actual municipal services rendered, and that the residents of, and persons owning property in, annexed territory shall be entitled to rights and privileges of citizenship, in ac-

cordance with the provisions of the annexing municipality's charter, immediately upon annexation as though such annexed territory had always been a part of the annexing municipality; and it shall be the duty of the governing body to put into effect with respect to an annexed area any charter provisions relating to representation on the governing body. Any municipality that exercises such right to annex is hereby authorized, required and shall levy separate ad valorem taxes for each municipal purpose and/or service within the existing limits of the city and shall levy only such taxes, if any, in any territory annexed hereunder when and if the municipal service or purpose for which such taxes have been imposed is actually being rendered; provided however, that in the case of sanitary sewers, such sewers shall be furnished within thirty-six (36) months after ad valorem taxes become due.

In the counties having a population of more than seven hundred thousand (700,000), or having a population of not less than two hundred and sixty thousand (260,000) nor more than two hundred and eighty thousand (280,000) according to the United States census of population of 1970 or any subsequent federal census, or in those counties which have the metropolitan form of government, a smaller municipality may, by ordinance, extend its corporate limits by annexation of any contiguous territory, when such territory within the corporate limits of a larger municipality is less than seventy-five (75) acres in area, is not populated, is separated from the larger municipality by a limited access express highway, its access ramps or service roads, and is not the site of industrial plant development. The provisions of this chapter relative to the adoption of a plan of service and the submission of same to a local planning commission, if there be such, shall not be required of the smaller municipality for such

annexation. [Acts 1955, ch. 113, §2; 1961, ch. 320; §1; 1969, ch. 136, §1; 1971, ch. 420, §§1, 2, 3; 1972 (Adj.S.), ch. 844, §1; 1974 (Adj.S.), ch. 753, §§1, 2, 8, 9]

* * *

APPENDIX H

TENNESSEE CODE ANNOTATED

* * *

6-310. Quo warranto to contest annexation ordinance--Appeal. -- Any aggrieved owner of property lying within territory which is the subject of an annexation ordinance prior to the operative date thereof, may file a suit in the nature of a quo warranto proceeding in accordance with §§ 6-308--6-320 and chapter 28 of title 23, to contest the validity thereof on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the affected territory and the municipality as a whole and so constitutes an exercise of power not conferred by law.

If more than one (1) suit is filed, all of them shall be consolidated and tried as one (1) in the first court of appropriate jurisdiction in which suit is filed. Suit or suits, shall be tried on an issue to be made up there, and the question shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and prop-

erty owners of the municipality. Should the court find the ordinance to be unreasonable, an order shall be issued vacating the same. In the absence of such finding an order shall be issued sustaining the validity of such ordinance, which shall then become operative thirty-one (31) days after judgment is entered unless an abrogating appeal has been taken therefrom.

If on appeal judgment shall be against the validity of such ordinance, an order shall be entered vacating the same; otherwise, it shall become operative forthwith by court order and shall not be subject to contest or attack in legal or equitable proceeding for any cause or reason, the judgment of the appellate court being final.

Should the territory hereafter sought to be annexed be the site of substantial industrial plant development, a fact to be ascertained by the court, the municipality shall have the burden or proving that the annexation of the site of the industrial plant development is not unreasonable in consideration of the factors above mentioned, including the necessity for, or use of municipal services by the industrial plant or plants, and the present ability and intent of the municipality to benefit the said industrial plant development by rendering municipal services thereto when and as needed. The policy and purpose of this provision is to prevent annexation of industrial plants for the sole purpose of increasing municipal revenue, without the ability and intent to benefit the area annexed by rendering municipal services, when and as needed, and when such services are not used or required by the industrial plants.

During the time that any annexation ordinance is being contested as provided herein, the annexing municipality and the county governing body (and/or any affected school, sanitary or utility district) may enter into an agreement

to provide for new, expanded, and/or upgraded services and facilities (including, but not limited to, equipment, land, and buildings), and capital expenditures (including sale of bonds) to finance such services and facilities, which agreement shall include an equitable division of the cost and liabilities of such capital expenditures between the annexing municipality and the county governing body (and/or affected school, sanitary, or utility district) upon final determination of such contested annexation ordinance. [Acts 1955, ch. 113, §2; 1961, ch. 220, §1; 1970 (Adj.S.), ch. 516, §1; 1974 (Adj.S.), ch. 753, §§4, 8, 9.]

* * *

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 24 1974
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-654

STATE OF TENNESSEE ex rel.
OTIS O'DELL, et al.,

Petitioners,

v.

THE CITY OF CHATTANOOGA,
TENNESSEE, et al.,

Respondents.

and

STATE OF TENNESSEE ex rel.
ROBERT J. HICKS, et al.,

Petitioners,

v.

THE CITY OF CHATTANOOGA,
TENNESSEE, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

EUGENE N. COLLINS
City Attorney

RANDALL L. NELSON
Special Counsel

400 Pioneer Bank Building
Chattanooga, Tennessee 37402

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

Opinion Below 1

I. The Jurisdictional Statement is Fatally Deficient. .. 2

II. The Writ Should be Denied Because no Issue was Decided Incorrectly Under the Applicable Decisions of This Court and Other Federal Courts and the Law of the Land. 4

A. The First Question Presented for Review .. 5

B. The Second Question Presented for Review .. 11

C. The Second Question Presented for Review .. 12

Conclusion 14

Appendix A

Complaint in Circuit Court of Hamilton County, Tennessee 1a

Motion to Amend Complaint 9a

Appendix B

Petition to Rehear filed in the Supreme Court of Tennessee 12a

Appendix C

Supplement to Brief and Argument in Support of Petition to Rehear filed in the Supreme Court of Tennessee 17a

Appendix D

Application for Special Leave to File Second Petition of Rehearing filed in the Supreme Court of Tennessee 23a

TABLE OF CITATIONS

Cases:	Page
Adams v. *City of Colorado Springs*, 308 F.Supp. 1397, aff. 399 U.S. 901, 90 S.Ct. 2197, 26 L.Ed.2d 555, reh. den. 400 U.S. 855, 91 S.Ct. 25, 27 L.Ed.2d 93	12
Brown v. *Maryland*, 12 Wheat 419, 6 L.Ed. 681	10
Brumley v. *Town of Greenville*, 38 Tenn.App. 322, 274 S.W.2d 12	13
Cardinale v. *Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398	3
Cash & Carry Lumber Co. v. *Olgiati*, 215 Tenn. 287, 385 S.W.2d 115	13
City of Gallatin v. *City of Hendersonville*, 510 S.W.2d 507	13
City of St. Joseph v. *Hankerson*, 312 S.W.2d 4, 8 (1958)	7
Congress of Industrial Organizations v. *McAdory*, 325 U.S. 472, 65 S.Ct. 1395, 89 L.Ed. 1741	4
Cosmopolitan Life Ins. Co. v. *Northington, etc.*, 201 Tenn. 541, 300 S.W.2d 911	8
Erie R. Co. v. *Williams*, 233 U.S. 685, 58 L.Ed. 1155, 34 S.Ct. 761, affg. 199 N.Y. 525, 92 N.E. 1084	10
Gant v. *Oklahoma City*, 298 U.S. 98, 77 L.Ed. 1058, 53 S.Ct. 530	10
General Truck Sales, Inc. v. *Batey*, —— Tenn.App. ——, 494 S.W.2d 130	4
Goldblatt v. *Town of Hempstead, New York*, 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987	10

Page

Hanson v. *Denckla*,
357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283, rehearing denied *Lewis* v. *Hanson*, 358 U.S. 858, 79 S.Ct. 10, 3 L.Ed.2d 92, rehearing denied 358 U.S. 858, 79 S.Ct. 10, 3 L.Ed.2d 92, conformed to 106 S.2d 549 3

Hardware Dealers' Mutual Fire Ins. Co. v. *Glidden Co.*,
384 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214 11

Hunter v. *City of Pittsburgh*,
207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907) ..5, 10, 12

International Harvester Co. v. *Kansas City*,
308 F.2d 35 (C.A. 10, 1962), cert. den. 371 U.S. 948, 83 S.Ct. 503, 9 L.Ed.2d 498 11

Morton v. *Johnson City*,
206 Tenn. 411, 333 S.W.2d 924 7

Nance v. *Winebarger*,
32 Tenn.App. 229, 222 S.W.2d 231 4

Ogden v. *Saunders*,
12 Wheat 213, 6 L.Ed. 606 10

Sailors v. *Board of Ed., etc.*,
387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967) .. 12

Standard Oil Co. v. *Maryville*,
279 U.S. 582, 584, 73 L.Ed. 856, 859, 49 S.Ct. 430 .. 10

State ex rel. Balsinger v. *Town of Madisonville*,
222 Tenn. 272, 435 S.W.2d 803 (1968) 10

State ex rel. Bastnagel v. *City of Memphis*,
224 Tenn. 514, 457 S.W.2d 532 (1970) 6, 7, 13

State ex rel. Cathey v. *City of Knoxville*,
211 Tenn. 304, 364 S.W.2d 912 (1962) 9

State ex rel. Cope v. *Mayor and Aldermen of Town of Morristown*, 218 Tenn. 593, 404 S.W.2d 798 (1966) 12

State ex rel. Hudson v. *City of Chattanooga*,
512 S.W.2d 555, cert. den. U.S.S.Ct. December 16, 1974 . 12

State ex rel. Robbins v. *City of Jackson*,
218 Tenn. 322, 403 S.W.2d 304 (1966) 9

Page

Tacon v. *State of Arizona*,
410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 3

Town of Oneida v. *Pearson Hardwood Flooring Co.*,
169 Tenn. 449, 88 S.W.2d 988 6

Zahn v. *Board of Public Works*,
274 U.S. 325, 328, 7 L.Ed. 1074, 1076, 47 S.Ct. 549 .. 10

Statutes:

Tennessee Code Annotated § 6-301, et seq. 6
Tennessee Code Annotated § 6-309, et seq. 5, 6, 11
Tennessee Code Annotated § 6-310 .....7, 13

Tennessee Constitutional Provisions:

Article XI, Section 9 6

United States Constitutional Provisions:

Fourteenth Amendment 4, 5, 11
Fifteenth Amendment 3, 5

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-654

STATE OF TENNESSEE ex rel.
OTIS O'DELL, et al.,

Petitioners,

v.

THE CITY OF CHATTANOOGA,
TENNESSEE, et al.,

Respondents.

and

STATE OF TENNESSEE ex rel.
ROBERT J. HICKS, et al.,

Petitioners,

v.

THE CITY OF CHATTANOOGA,
TENNESSEE, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The original opinion of the Supreme Court of Tennessee and its opinion on petition to rehear is reported at 513 S.W.2d 780 (July 29, 1974).

Respondents respectfully submit that no writ of certiorari

should issue to review the judgment of the Supreme Court of the State of Tennessee for the reasons hereinafter set forth.

I. THE JURISDICTIONAL STATEMENT IS FATALLY DEFICIENT.

Respondents would show that both the jurisdictional statement and the statement of the case in the petition are deficient, and not in compliance with Rule 23(f) of this Court. Specifically, the statement of the case at pages five through nine of the petition does not comply with these requirements of Rule 23(f):

> "[the petition shall] specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Petitioners herein have presented three questions for review. As a point of fact, neither of the first two questions was raised in the court of first instance and, of course, was not passed upon by said court for that reason. A copy of the original complaint in the two actions is enclosed herewith as Appendix A and to show that these issues were not raised. The other original complaint was, in essence, identical except for caption and reference to the areas involved.

Moreover, respondents would show that the petitioners herein never raised the first question presented for review to this Court in the Supreme Court of Tennessee in either their

original answers to respondents' assignment of errors, their petition to rehear (Appendix B), their supplement to the petition to rehear (Appendix C), nor in their application for special leave to file a second petition for rehearing (Appendix D) nor at any time.

Further, as to the second question presented for review, petitioners never raised this question until they filed a supplemental brief and argument in support of their petition to rehear in the Supreme Court of Tennessee.

With respect to the third question presented for review, petitioners did raise the Fourteenth Amendment issue in the trial court in section nine of their original complaint, although never raising any issue under the Fifteenth Amendment herein asserted. Petitioners, however, never preserved their rights to further consideration on this question by taking a cross appeal to the Supreme Court of Tennessee, by mentioning the same in their replies to any of respondents' pleadings in the Supreme Court of Tennessee, nor in any other way bringing this matter before the Supreme Court of Tennessee for its consideration.

Thus, the petition fails to show that "the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." Rule 23(f). It has, of course, been held that this court cannot decide issues, such as the first question presented for review in the instant petition, which are raised for the first time on review of the state court decision. *Tacon* v. *State of Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346. *Cardinale* v. *Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed. 2d 398.

Secondly, the second question presented for review, not having been presented to the Tennessee courts until the supplement to the petition for rehearing, was not seasonably presented to the Tennessee courts and, therefore, should not be decided by this court. *Hanson* v. *Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283, rehearing denied *Lewis* v. *Hanson*, 358 U.S. 858, 79 S.Ct. 10, 3 L.Ed.2d 92, rehearing

denied 358 U.S. 858, 79 S.Ct. 10, 3 L.Ed.2d 92, conformed to 106 S.2d 549.

Finally, as to the third question presented for review, two of the original plaintiffs did raise the issue in the original complaint. However, this issue was stricken by the Circuit Court, and certain plaintiffs to whom it was pertinent did not perfect an appeal upon being dismissed from the lawsuit and are not participating in this petition. Moreover, when the case was taken to the Tennessee Supreme Court, none of the remaining original plaintiffs relied on this issue, nor did anyone at any time call it to the attention of the Supreme Court of Tennessee. Under the law of Tennessee, the appellee is also permitted to file assignments of error in cases such as this (*General Truck Sales, Inc.* v. *Batey*, — Tenn.App. —, 494 S.W.2d 130; *Nance* v. *Winebarger*, 32 Tenn.App. 229, 222 S.W.2d 231), but they failed to do so in this case. Since the Tennessee Supreme Court did not pass on the question now urged, and since it was not presented to that court for decision, it should not be considered here. *Congress of Industrial Organizations* v. *McAdory*, 325 U.S. 472, 65 S.Ct. 1395, 89 L.Ed. 1741 (and cases cited therein).

Thus, because the questions presented for review by the petitioner were not properly presented to the courts below, it is respectfully submitted that the petition for certiorari should be denied.

II. THE WRIT SHOULD BE DENIED BECAUSE NO ISSUE WAS DECIDED INCORRECTLY UNDER THE APPLICABLE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS AND THE LAW OF THE LAND.

Petitioners herein have raised three Questions Presented for Review, which are as follows:

1. Whether petitioners were deprived of their rights to due process of law and the equal protection of the laws under the Fourteenth Amendment to the United States Constitution

by the Supreme Court of Tennessee in its adoption of a "fairly debatable" test when, as applied by the said Court, diminishes the role intended by the Tennessee Legislature of a trial judge in an annexation proceeding and in effect nullifies the legislative right of petitioners to contest the validity of an annexation ordinance.

2. Whether T.C.A. § 6-309, annexation by ordinance, violates the one-man, one-vote principle and is, therefore, unconstitutional in violation of the Fourteenth Amendment to the United States Constitution.

3. Whether the petitioners' rights to due process of law under the Fourteenth Amendment to the United States Constitution and their rights under the Fifteenth Amendment to the United States Constitution were violated when they were denied the right to offer evidence of a preconceived and unconstitutional plan to dilute the voice and influence of the black citizens within the City of Chattanooga.

As demonstrated in Section I of this Brief, none of these issues were timely presented to the Supreme Court of Tennessee, but even assuming they were, there is nothing in the decisions of the courts below which either implicitly or explicitly is in conflict with any decision of this Court.

A. The First Question Presented for Review.

Petitioner contends, in substance, that the Tennessee Supreme Court's interpretation of a Tennessee statute is not what the Tennessee Legislature intended, and, therefore, their rights to due process of law and equal protection of the laws have been violated.

Aside from the fact that petitioners herein never raised this issue in any of the courts below, and no evidence was ever introduced as to the intent of the legislature, it is submitted that this contention fails to state a substantial federal question. This Court held, in *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151:

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and *the territory over which they shall be exercised rests in the absolute discretion of the state.* Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the federal constitution. The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, *expand or contract the territorial area,* unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. *All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protests. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . .*" (Emphasis supplied.)

Traditionally, in Tennessee, changing the boundaries of governmental subdivisions has been considered a legislative, as opposed to judicial function. *Town of Oneida* v. *Pearson Hardwood Flooring Co.*, 169 Tenn. 449, 88 S.W.2d 988. Prior to the Constitutional Amendment of 1953 (Art. XI, Section 9, of the Tennessee Constitution) and the passage of Tennessee Code Annotated § 6-301, et seq., in 1955, the Legislature could, with an unfettered hand, change the boundaries of the state's municipal corporations. By the general act of 1955, which has been codified as Tennessee Code Annotated § 6-309, et seq., the legislature delegated its powers to municipal corporations, which were thereby empowered to annex by ordinance, as has been done in the case at bar. As was pointed out in *State ex.*

rel. Bastnagel v. *City of Memphis*, 224 Tenn. 514, 457 S.W.2d 532 (1970), "the Legislature then could have delegated to the municipalties the authority to annex with no right of judicial review absent constitutional restraint." But the legislature, by the same act, conferred upon the courts jurisdiction to hear quo warranto actions brought by "any aggrieved owner of property lying within territory which is the subject of an annexation ordinance." This right is the exclusive right of judicial review, which the property owners "would not otherwise have had."

The pertinent part of Tennessee Code Annotated § 6-310 provides:

> "Suit or suits, shall be tried on an issue to be made up there, and *the question shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality.* Should the court find the ordinance to be unreasonable, an order shall be issued vacating the same. In the absence of such finding an order shall be isued sustaining the validity of such ordinance, with shall then become operative thirty-one (31) days after judgment is entered unless an abrogating appeal has been taken therefrom." (Emphasis supplied.)

The question of "reasonableness" first came before the Tennessee Supreme Court in the case of *Morton* v. *Johnson City*, 206 Tenn. 411, 333 S.W.2d 924. The Court therein resolved this issue as follows:

> "After many days of studying this record, reading various and sundry authorities, those cited in the briefs and others, we have concluded that the reasons set forth by the Supreme Court of Missouri in the case of *City of St. Joseph* v. *Hankinson*, decided in 1958, reported in 312 S.W.2d 4, 8, concisely, logically and correctly determined. . . . .

"In the Missouri case, in reference to this question, that court had this to say:

> "• • • the court does not, in any sense, substitute its discretion or judgment as to the advisability or propriety of the annexation for that of the legislative body of the city, and that it does not review the legislative discretion; its consideration of 'reasonableness' is confined to a determination of whether there exists a sufficient showing of reasonableness to make that question, at the least, *a fairly debatable one; if there is such, then the discretion of the legislative body is conclusive.* Citing authorities. (Emphasis ours.)

"The function of our courts, historically, has been merely to determine, in the light of these principles, whether the exercise of legislative powers *has been arbitrary and clearly unreasonable.* (See the cases just cited.) *Only to this extent do our courts consider the reasonableness of an annexation.* (Emphasis ours.)

"And further that Court had this to say as to our powers under these annexation cases, that the part that the court plays is, to decide whether the legislative declaration by the city is so palpably unreasonable and unnecessary as to be arbitrary and oppressive exercise of its legislative power. With this reasoning of the Missouri Court we wholeheartedly agree and hold that this is the reasoning that should apply and which we adopt as applying in these annexation cases. The same principles exactly are gathered from White v. City of Glasgow, supra, and what we quoted from this Kentucky case. After studying and reading annexation cases from States all over the Union we have concluded that the principles above enunciated are the ones that are applicable to the instant lawsuit under annexation by the City.

"For years this Court has applied a similar and unrelated reasoning to acts of the Legislature. See Cosmopolitan Life Ins. Co. v. Northington, etc., 201 Tenn. 541, 300 S.W.2d 911, and cases therein cited. In this case we held that where the Legislature has enacted legislation on the

basis of facts and things known to the Legislature that the courts will not inquire into the policy of the Legislature but will only determine whether or not there was a plausable reason for enacting such legislation, and that we will not examine a question de novo and overrule the judgment of the Legislature by substituting our judgment for it unless it clearly appears that the regulations enacted by the Legislature are beyond all reasonable relation to the subject to which they are applied as to amount to merely arbitrary usurpation of power, or they are unmistakably and palpably in excess of legislative power, or they are arbitrary beyond possible justice and that if any state of facts can be reasonably conceived that would sustain legislation in enacting an Act, an Act will be assumed to have existed when the law is enacted, and one attacking this classification of the act must bear the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

"We see no reason of why such reasoning is not applicable to a legislative act of the City Council when it is vested with the authority and power to legislate by an act of the Legislature. The authors of 37 American Jurisprudence, Page 645, Section 28 thereof, say that the power to annex 'is exclusively a legislative power,' and 'in the exercise of that power great latitude must necessarily be accorded to the legislative discretion, and every reasonable presumption in favor of the validity of its action must be indulged. The courts cannot call into question the wisdom or expediency of the legislative determination.'"

This construction of "reasonableness" (i.e., that the Court's "consideration of 'reasonableness' is confined to a determination of whether there exists a sufficient showing of reasonableness to make that question, at the least, *a fairly debatable one; if there is such, then the discretion of the legislative body is conclusive.*") has been consistently adopted by our courts ever since it was first enunciated. *State ex rel. Cathey* v. *City of Knoxville*, 211 Tenn. 304, 364 S.W.2d 912 (1962); *State ex rel. Robbins* v. *City of Jackson*, 218 Tenn. 322, 403 S.W.2d 304

(1966); *State ex rel. Cope* v. *Mayor and Aldermen of Town of Morristown,* 218 Tenn. 593, 404 S.W.2d 798 (1966); and *State ex rel. Balsinger* v. *Town of Madisonville,* 222 Tenn. 272, 435 S.W.2d 803 (1968).

Perhaps most persuasive is that this Court itself has adopted the same test as it regards the reasonableness of ordinances. In *Gant* v. *Oklahoma City,* 298 U.S. 98, 77 L.Ed. 1058, 53 S.Ct. 530, this Court held:

> "Whether the judgment of the common council of the city in the present case was wise, or whether the requirement will produce hardship in particular instances, are matters with which this court has nothing to do. It is impossible for us to say that the provisions of the ordinance are clearly arbitrary and unreasonable. If there be room for fair debate, this court 'will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.' Zahn v. Board of Public Works, 274 U. S. 325, 328, 7 L. ed. 1074, 1076, 47 S. Ct. 594; Standard Oil Co. v. Maryville, 279 U. S 582, 584, 73 L. ed. 856, 859, 49 S.Ct. 430." [1]

Indeed, it has long been well established in the law that statutes or ordinances are presumed valid, and those attacking them must bear the burden of showing them to be invalid.[2]

Further, under *Hunter, supra,* the states may change municipal boundaries "with or without the consent of the citizens, or even against their protests." This being true, it would logically seem that their is no endemic due process right to judicially con-

---

[1] For further authority that this is the prevailing law, see 16 Am. Jur.2d 473, Constitutional Law § 225.

[2] *Goldblatt* v. *Town of Hempstead, New York,* 369 U.S. 590, 8 L.Ed. 2d 130, 82 S.Ct. 987; *Erie R. Co.* v. *Williams,* 233 U.S. 685, 58 L.Ed. 1155, 34 S.Ct. 761, affg. 199 N.Y. 525, 92 N.E. 1084; *Ogden* v. *Saunders,* 12 Wheat 213, 6 L.Ed. 606; *Brown* v. *Maryland,* 12 Wheat 419, 6 L.Ed. 681.

test an annexation, absent legislative authority.[3] This being true, the remedy adopted by the state legislature, as interpreted by the highest court of the state, should be upheld, since it is not unreasonable or arbitrary and the procedure adopted satisfies the constitutional requirements of reasonable notice and opportunity to be heard.[4]

Petitioners' basis for a writ of certiorari is that the Tennessee Supreme Court's holding is erroneous under state law. This contention is clearly erroneous. Not only was there no error in the decision, but also, it was directly held in *Hunter, supra*:

> "We have nothing to do with the interpretation of the Constitution of the State and the conformity of the enactment of the assembly to that Constitution; those questions are for the consideration of the courts of the state, and their decision of them is final."

Hence, it is respectfully submitted that the first question presented for review does not present such a substantial question of federal law as to justify this Court granting a writ of certiorari.

B. The Second Question Presented for Review.

Petitioners' second question presented is that Tennessee Code Annotated § 6-309 violates the one-man, one-vote principle and, therefore, violates the Fourteenth Amendment.

The argument could only have a efficacy if residents of the annexed area were denied the vote after becoming residents of the City. This has not been alleged, nor is it, in fact, true. Petitioners' essential underlying contention is that residents of an area being annexed have a federal constitutional right to

---

[3] *See International Harvester Co. v. Kansas City*, 308 F.2d 35 (C.A. 10, 1962), cert. den. 371 U.S. 948, 83 S.Ct. 503, 9 L.Ed.2d 498.

[4] *See Hardware Dealers' Mutual Fire Ins. Co.* v. *Glidden Co.*, 384 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214.

vote on the annexation. This argument is foreclosed by that language in *Hunter, supra,* which provides that a state may extend the territorial area of its municipalities "with or without the consent of the citizens, or even against their protests."

This very issue has recently been decided adversely to petitioners' position. In *Adams* v. *City of Colorado Springs,* 308 F.Supp. 1397, aff. 399 U.S. 901, 90 S.Ct. 2197, 26 L.Ed.2d 555, reh. den. 400 U.S. 855, 91 S.Ct. 25, 27 L.Ed.2d 93, it was held:

> "We must also recognize that there is no absolute constitutional right under the *due process* clause of the Fourteenth Amendment to vote on proposed annexation. *See Sailors* v. *Board of Ed., etc.,* 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967); *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907)."

Also to this effect is *State ex rel. Hudson* v. *City of Chattanooga,* 512 S.W.2d 555, cert. den. U.S.S.Ct. December 16, 1974. There can, of course, be no equal protection abuse here, because, under Tennessee law, no referendum is held on annexation, so that these petitioners are being treated equally with everyone else.

Hence, it is respectfully submitted that the second question presented for review is without merit.

C. The Third Question Presented for Review.

Petitioners' third question presented for review is essentially that their rights to due process were violated because they were refused the right to offer evidence that the annexation's motivation was to dilute the influence of the black citizens within the City.

Of course, as demonstrated in Section I of this Brief, this issue was never presented to the Supreme Court of Tennessee and, therefore, does not warrant the granting of a writ of certiorari. Further, no appeal was ever taken by the two black citizens of the City on whose behalf this issue was raised. Moreover, these two black persons were not residents of the area being annexed.

Respondents deny, therefore, that the issue is properly before the Court, but, on the assumption that it were, would show that it is, likewise, without merit.

Respondents take the position that the allegation in the original complaint was a spurious attempt to enflame the possions of the jury petitioners demanded, and, as such, was properly stricken by the trial court. This attempt is demonstrated by the fact that the allegation in the complaint attacked the passage of the ordinance, not on the basis of its effect, if any, on the black community, but on the basis of respondents' motivations, and reasons for enacting the ordinance. Axiomatically, this was improper, and the trial court was eminently correct in striking such language, because it has long been the law of Tennessee, as well as the general rule across the country, that the courts will not inquire into the motives that prompted the exercise of a discretionary power of a municipal legislative body, except where allegations of fraud or bad faith are made. *Cash & Carry Lumber Co.* v. *Olgiati*, 215 Tenn. 287, 385 S.W. 2d 115; *Brumley* v. *Town of Greenville*, 38 Tenn.App. 322, 274 S.W.2d 12; McQuillin, *Municipal Corporations*, 3rd Ed. (1966 Revised Volume), Vol. 2, Section 10.35, p. 830, et seq. Again, if petitioners thought this rule unjust either in its origin or as applied, they should have brought it to the attention of the Tennessee Supreme Court.

The trial court's decision to strike this allegation of the complaint is strengthened by the holding in *State of Tennessee ex rel. Bastnagel* v. *City of Memphis, supra,* that the procedure of Tennessee Code Annotated § 6-310 is the *exclusive* remedy granted persons seeking to contest annexation. Said statute clearly confines the right of action to citizens and residents of the annexed area.

The Tennessee Supreme Court has further held this statute to mean that non-residents of and persons not owning property in the area to be annexed have no standing to bring an action. *City of Gallatin* v. *City of Hendersonville*, 510 S.W.2d 507. Thus, the trial court's decision in dismissing the residents of the

City who alleged no ownership of property in the area to be annexed was clearly correct.

The trial judge who heard this case and the Supreme Court of Tennessee both found that the annexation by the City was prompted by the conditions in the area being annexed and its need for City services. These conditions are set forth in detail at 513 S.W.2d 782. They have absolutely nothing to do whatsoever with race and constitute a valid, adequate, constitutional state ground for the annexation.

It is, therefore, respectfully submitted that petitioners' third ground for review is without merit.

CONCLUSION

Petitioners herein have failed to show that the federal questions they now seek to raise have been timely and properly raised so as to give this Court jurisdiction to review the judgment by writ of certiorari. Further, even had the questions they have presented for review been timely raised, no substantial federal question has been raised which has been decided adversely to any decision of this Court, other federal courts, or the law of the land.

It is, therefore, respectfully submitted that no writ of certiorari should issue.

EUGENE N. COLLINS,
City Attorney

RANDALL L. NELSON,
Special Counsel
400 Pioneer Bank Building
Chattanooga, Tennessee 37402

APPENDIX A

IN THE CIRCUIT COURT OF

HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE, EX REL, ROBERT J. HICKS ROY F. HARTMAN MRS. A. M. CAGLE A. M. CAGLE NAPOLEON ALEXANDER, JR. CHARLES E. ANDERSON JOHN H. BARRETT BEATRICE ALLGOOD DORIS C. HICKS ALBERT B. HICKS HUBERT McNABB MRS. HUBBARD F. DAVIS W. T. BURGESS REALTORS, v. CITY OF CHATTANOOGA, ROBERT KIRK WALKER, MAYOR, ET AL, and DAVID M. PACK, EX REL, ATTORNEY GENERAL OF THE STATE OF TENNESSEE, DEFENDANTS,	No. N 16199

COMPLAINT

Comes now the relators named in the caption and respectfully show to the Court as follows:

I

This suit in the nature of a Quo Warranto is filed pursuant to TENNESSEE CODE ANNOTATED, 6-310, to contest the validity of certain ordinances of the City of Chattanooga

designated as Ordinance No. 6393, which purports to annex to the City of Chattanooga an area lying west of the present city boundaries, commonly referred to as Wauhatchie, and identified on the defendants' Study Area Boundaries may as Area 12; and Ordinance No. 6394, purporting to provide a plan of taxation for the said Area 12 annexed by Ordinance No. 6393. True and exact copies of said ordinances are attached hereto as Exhibit A and B, and are hereby adopted and made a part hereof as fully and completely as though specifically copied herein, but not for copy.

The relators named in the caption are citizens and property owners within said Area 12 and the City of Chattanooga.

II

Relators aver that the motive behind the annexation of Area 12 or Wauhatchie by the defendants is something other than to prevent the material retardation of the prosperity of the City of Chattanooga and Area 12, and further that the defendants have in reality made no determination that the safety and welfare of the inhabitants and property of the City of Chattanooga and Area 12 is in danger unless annexed by the defendants. Relators aver that the two reasons for the defendant's actions in passing said ordinances were to raise additional revenues for the City of Chattanooga and to dilute the growing influence of the black citizenry within the present boundaries of the City of Chattanooga.

III

That said Ordinance No. 6393, which purports to annex Area 12 to the present corporate limits of Chattanooga states:

> "WHEREAS, after such public hearing and investigation by the Board of Commissioners and its representatives, it now appears that the prosperity of the territory herein described, and as described in said Notice, and the municipality, will be materially retarded, and the safety and welfare of the inhabitants and prosperity of this city

and the herein described territory will be endangered if such area is not annexed;"

Realtors aver that any finding by the defendants that the municipality or Area 12 would be materially retarded and the safety and welfare of its inhabitants and property would be endangered if such area is not annexed, based upon the so-called public hearing as cited in said ordinance, is erroneous and constitutes an arbitrary and oppressive exercise of powers delegated to the City of Chattanooga by the Tennessee Legislature. Further, relators must assume that the investigation referred to in said ordinance hereinabove set out must be in reference to the fringe area study prepared by Hensley-Schmidt, Inc., exclusively for the City of Chattanooga and paid for by the already overburdened taxpayers of the City of Chattanooga. Relators aver that the defendants have not even followed the recommendations made in the Hensley-Schmidt, Inc., report. Relators aver therefore that any attempt by the defendants to justify the annexation of Area 12 on facts discovered at the so-called public hearing, or because of recommendations made by Hensley-Schmidt, Inc., which defendants have not followed, is a fraud upon the citizens and property owners of the City of Chattanooga and Area 12 and is an abuse of its delegated legislative powers.

IV

Relators would show to the Court that the prosperity of the City of Chattanooga and Area 12 will not be materially retarded and the safety and welfare of the inhabitants and property thereof endangered if such annexation does not take place, and therefore, Ordinances 6393 and 6394 are unreasonable and the passing of said ordinances is a further abuse of the defendants' delegated legislative powers.

V

That the annexation of Area 12 by the defendants reasonably may not be deemed necessary for the welfare of the

residents and property owners of Area 12 and the City of Chattanooga as a whole and so constitutes an exercise of power not conferred by law.

VI

Relators aver that the notice given by defendants of a public hearing was defective and did not comply with TENNESSEE CODE ANNOTATED, 6-308 or 6-309; that said notice included a confusing and erroneous boundary description of Area 12 and that many people included in said Area 12 were unaware of their inclusion. Further, the defendants did not conduct the so-called public hearing in accordance with the intent of the Tennessee Legislature to have a public hearing for the purpose of ascertaining information helpful in determining whether or not the prosperity of a municipality and territory proposed to be annexed will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered.

VII

That Area 12 includes many acres of land used purely for agricultural purposes, which is neither necessary for building or for the population of Chattanooga or Area 12. Further Area 12 includes Williams Island with no means of ingress or egress, except by boat or barge, and the purpose of its annexation defies the imagination of reasonable men except for providing additional property tax revenues for the defendants. That the annexation of Williams Island and many, many other acres of agricultural land located in Area 12 has nothing whatsoever to do with the health, safety, and welfare of the citizens and property owners of Chattanooga or Area 12. That said agricultural land is owned by some of the relators herein and is not held by them for sale or use as residential lots and the inclusion of said land by the defendants for annexation is unreasonable and again constitutes an abuse of the defendants' delegated powers and an exercise of power not conferred by law.

VIII

Relators aver that one reason for the annexation of Area 12 to Chattanooga by the defendants was to secure additional revenue for the City of Chattanooga and as such is not a legitimate reason for said annexation and is contrary to the intent of the Tennessee State Legislature in passing Section 6-309 of the TENNESSEE CODE ANNOTATED, and further does not support the alleged finding by the defendants that Area 12 will be materially retarded and the safety and welfare of its inhabitants and property endangered. Relators further aver that this illegal exercise of power by the defendants constitutes a violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and is thereby unconstitutional.

IX

Relators further aver that the second reason for the defendants' arbitrary and unreasonable annexation of Area 12 was to carry out a preconceived plan designed solely to dilute the voice and influence of the black citizens and property owners within the present boundaries of the City of Chattanooga by extending its boundaries to include an area marked by its absence of any black residents, and that as such said annexation ordinance discriminates against the black citizenry of the City of Chattanooga and constitutes a violation of the privileges and immunities, due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

X

That the said ordinances violate the Fifth Amendment to the United States Constitution.

XI

That the proposed annexation is unreasonable because it creates an unfair and unreasonable financial burden on both

the citizens living within the presently incorporated City of Chattanooga as well as the citizens in the areas to be annexed by the ordinances heretofore referred.

XII

That the boundary description for Area 12 is incorrect; that defendants and Hensley-Schmidt, Inc., were advised of errors in said description prior to the third and final reading of Ordinances 6393 and 6394, but took no steps to correct said description. That said description incorrectly describes a point therein as being the northeast corner of the property now or formerly owned by Carl J. Johnson. That said point is not the northeast corner and that said description from that point on is incorrect, confusing and in fact does not make any sense at all. That as a result of said description and its publication thereof, many citizens and property owners living in Area 12 were and still are unaware of their inclusion in the defendants' annexation of Area 12. Relators aver that Ordinances No. 6393 and 6394 are null and void and unreasonable because they purport to annex and provide a plan of services for an area incorrectly described and confusing to the citizens and property owners of Area 12. Relators aver that said ordinances do not annex the area they purport to because of the faulty and incorrect boundary description, and said ordinances are thereby invalid.

XIII

That prior to the passage of the ordinances No. 6393 and 6394, the defendant adopted Resolution No. 9166 purporting to adopt a plan of services setting forth the identification and the projected timing of municipal services proposed to be extended by the City of Chattanooga into Area 12 proposed to be annexed to said city. That authority for the adoption of said plan of services is based on Chapter 420 of the TENNESSEE PUBLIC ACTS OF 1971, a copy of which is attached hereto as Exhibit C and is hereby adopted and made a part

hereof as fully and completely as though specifically copied herein, but not for copy. That prior to the adoption of said Resolution No. 9166, complaint for declaratory judgment was filed by the Hamilton County Judge and the County Council seeking to have said Chapter 420 of the 1971 TENNESSEE PUBLIC ACTS declared unconstitutional and in violation of Article 2, Section 9, of the Constitution of the State of Tennessee. That said complaint for declaratory judgment is pending in the Chancery Court of Hamilton County, Tennessee, and no final adjudication of the constitutionality of said public act has been made. Relators aver, therefore, that the hearing of this cause should be delayed until after a final adjudication by the Tennessee Supreme Court has been made regarding the constitutionality of Chapter 420 of the 1971 TENNESSEE PUBLIC ACTS. Relators aver that to do so otherwise would seriously jeopardize their right to fairly and equitably litigate the reasonableness or unreasonableness of the proposed annexation of Area 12. Further, that in the event said Chapter 420 is declared unconstitutional, the defendants have made no provision for an alternate reasonable plan of services for said Area 12. Relators further aver that the defendants have acted arbitrarily and abused their delegated legislative powers by passing ordinances unreasonable on their face purporting to annex Area 12 by a method of which its constitutionality has not been determined.

PREMISES CONSIDERED, complainants pray:

1. That proper process issue and be served on the defendants requiring them to answer this complaint, but oath to their answer is waived.

2. That this Honorable Court declare that Ordinances No. 6393 and No. 6394 were illegally enacted by the defendants and are unreasonable and invalid, and that the Court enter a decree vacating the same.

3. That the Court postpone a hearing in this matter until after a final adjudication by the Tennessee Supreme Court

adjudging the constitutionality or unconstitutionality of Chapter 420 of the 1971 TENNESSEE PUBLIC ACTS.

4. That the Court render a judgment on the constitutional questions raised in this complaint.

5. That a Jury try the issues of fact in this cause.

6. That complainants have such other, further, and general relief as is just.

. . . . . .
. . . . . .
. . . . . .
. . . . . .

COFFEY, SUMMITT AND O'NEAL

BY: THOMAS H. O'NEAL, Attorneys

for Relators

808 MACLELLAN BUILDING
CHATTANOOGA, TENNESSEE 37402

IN THE CIRCUIT COURT OF
HAMILTON COUNTY, TENNESSEE
DIVISON No. ————

No. N-16199

STATE OF TENNESSEE, EX REL,
ROBERT J. HICKS, et al.,

v.

CITY OF CHATTANOOGA, et al.

MOTION

Come the plaintiffs, through their attorney, and move the Court to permit them to amend their complaint by adding the following paragraph at the end of Paragraph XIII:

> That TCA 6-309 requires that before any territory more than one-fourth square mile in area, or having a population of more than 500 persons, may be annexed under TCA 6-309, the governing body of the municipality shall adopt a plan of service setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. Said section further provides that before any such plan of service shall be adopted it must have been submitted to the local planning commission for study and a writtten report to be rendered within 90 days after such submission unless by resolution of the governing body a longer period is allowed. Plaintiffs aver that the plan of service adopted for Wauhatchie or Area 12 by the defendant, City of Chattanooga, was a schedule of services based strictly upon Chapter 420 of the 1971 Tennessee Public Acts (Variable Tax Act), which on December 18, 1972, was found to be unconstitutional by

the Tennessee Supreme Court. Further, this plan was the only plan of services submitted to the Chattanooga-Hamilton County Regional Planning Commission and was the only one considered by them and reported on by them.

Plaintiffs further aver that in the report of Marble Hensley updating the fringe area study for the City of Chattanooga, he stated that in the event Chapter 420 of the Public Acts of 1971 which allows the use of a variable tax rate, shall be unconstitutional then the City of Chattanooga shall request its consultant to prepare a plan of services under the act of 1955 as soon as practical. Plaintiffs aver that no such request was ever made by defendant and now that the Variable Tax Act is unconstitutional there is no legally adopted plan or schedule of services and, therefore, a basic requirement of TCA 6-309 has not been satisfied and the ordinance annexing Area 12 by the City of Chattanooga is not in compliance with TCA 6-309 and is, therefore, invalid.

In addition, plaintiffs respectfully request this Court to allow another amendment to its complaint by adding the following paragraph:

XIV

That Ordinance No. 6393 annexing Area 12 to the City of Chattanooga included a reference to a plan of services adopted by the defendant, City of Chattanooga, which plan of services was adopted by defendant in its Resolution No. 9166, which resolution provided for a specific plan of services based upon the now unconstitutional Variable Tax Act. Said resolution further provides that if Chapter 420 of the Public Acts of 1971 should be declared invalid or otherwise not applicable so that separate ad valorem taxes may not be levied and collected for services actually rendered said territory, then all services will be rendered to the territory as soon as practical, immediately in some instances but not later than the plan of services set out. Plaintiffs aver that this

language is vague and indefinite and violates the due process clause of the United States Constitution. Since the Variable Tax Act was declared unconstitutional, there is in reality no plan of services and the plaintiffs are left only with the catch-all reference by the defendant that all services will be rendered to the territory as soon as practical immediately in some instances, but not later than the plan of services set out. Plaintiffs aver that this language violates basic statutory law which requires a statute to be definite to be valid. Plaintiffs aver that if defendant is attempting to rely on the plan of services based on the Variable Tax Act as its present plan of services then due to the unconstitutionality of the Variable Tax Act, which therefore results in full taxation to the residents on the effective date of annexation, the said plan of services is unreasonable on its fact and the annexation of Area 12 based upon such a plan of services is unreasonable and invalid.

COFFEY AND O'NEAL

By: THOMAS H. O'NEAL,
Attorney for Plaintiffs,
808 MACLELLAN BUILDING
CHATTANOOGA, TENNESSEE 37402

APPENDIX B

In The

SUPREME COURT OF TENNESSEE AT KNOXVILLE

HAMILTON COUNTY LAW

No. 89

STATE OF TENNESSEE, EX REL
OTIS O'DELL, ET AL.,
APPELLEES,

v.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
APPELLANTS.

HAMILTON COUNTY LAW

No. 90

STATE OF TENNESSEE, EX REL
ROBERT J. HICKS, ET AL.
APPELLEES,

v.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
APPELLANTS.

PETITION TO REHEAR ON BEHALF OF APPELLEES, OTIS O'DELL, ET AL, AND ROBERT J. HICKS, ET AL

THOMAS H. O'NEAL
COFFEY AND O'NEAL
808 MACLELLAN BUILDING
CHATTANOOGA, TENNESSEE 37402
ATTORNEYS FOR APPELLEES.

PETITION TO REHEAR

Come the Appellees and show to the Court that they are much aggrieved by the decision of the Supreme Court rendered in the captioned cases, and petition the Court to rehear this matter and re-examine its opinion for the following reasons:

1. As pointed out by Special Justice W. M. Leech on page 6 of the Opinion of the Supreme Court, Appellees in their brief made an erroneous statement with regard to the case of *State, Ex Rel, Cope, et al.* v. *Mayor & Board of Aldermen of the Town of Morristown*, 218 Tenn. 593, 404 SW2d 798 (1966). This statement, however, was based upon a later Morristown case, *State of Tenn., Ex Rel, Spoone* v. *Mayor & Board of Aldermen of the Town of Morristown*, 222 Tenn. 21, 431 SW2d 827 (1968), but Appellees through error cited the style of the 1966 Morristown case in lieu of the 1968 Morristown case.

Likewise, on page 10 of Appellees' brief, Appellees again through error cited the style of the earlier Morristown case when, in fact, they were relying upon the decision in the later Morristown case and fully intended to cite the later Morristown case.

Although, annexation cases should be decided not upon precedent but upon their own facts and which by their very nature cannot be identical to any other situation involving another territory of the State of Tennessee, the later Morristown case, *State of Tenn., Ex Rel, Spoone* v. *Mayor & Aldermen of the Town of Morristown*, 222 Tenn. 21, 431 SW2d 827 (1968), on which Appellees rely is relevant and similar to the Tiftonia-Wauhatchie cases and will be further discussed in Appellee's brief in support of this petition to rehear.

2. The Supreme Court, at least in its opinion, overlooked the following material fact. At the close of all of the proof, Trial Judge Boaz personally toured each of the areas proposed for annexation. A review of this portion of the trial is

difficult, if not impossible. Judge Boaz, after hearing proof for seven days, observing the demeanor and character of the witnesses coupled with a personal tour of the areas, determined that:

> ". . . There was *virtually no proof* of any relationship between the natural growth of the City of Chattanooga and the land area to the west of the city and, consequently, no proof that it would be necessary to plan the development of these areas for the future orderly development of the city. There was proof that the construction of I-24 had made these areas more easily accessible to the City of Chatanooga, but there was also proof that one of the principal arteries for transportation from this area was along the Cummings Highway which passes through a county area before getting into the areas known as Tiftonia and Wauhatchie. The welfare of the residents and property owners of Tiftonia and Wauhatchie, as well as the City of Chattanooga, would not in the Court's opinion be adversely affected if the annexation of the two areas was not consummated. In view of the above findings and after giving due consideration to the *typography* (sic) and *geographic* features of the two areas as related to the city, the annexation of Tiftonia and Wauhatchie *cannot reasonably* be justified at this time and it is the Court opinion that annexation would be *unreasonable* under the circumstances" (Emphasis Supplied)

TR 140 and 141.

For seven days, Judge Boaz heard proof of severely limiting features for development in Tiftonia and Wauhatchie, including proof that a relatively small percent of the Tiftonia-Wauhatchie area could ever be developed because of high ridges, mountainous terrain, a large island with no ingress and egress comprising a substantial portion of the Wauhatchie area, large portions of land lying within flood plains, and other limiting features including water and mountains separating the communities from the City of Chattanooga. This proof was substantiated by Judge Boaz when he personally toured the

areas after which he concluded that the annexation of both areas was unreasonable. Judge Boaz did not ignore the fairly debatable rule and specifically abided by Section 6-310 of the TENNESSEE CODE ANNOTATED, wherein his duty to determine whether or not an annexation ordinance is unreasonable is set forth.

An examination of the voluminous record in these cases will illustrate that with regard to Tiftonia and Wauhatchie the proof of the Appellant, City of Chattanooga, was nothing more than general statements and glowing phrases that annexations are good for municipalities. Appellees overwhelming carried the burden of proof that the annexation of Tiftonia and Wauhatchie is not necessary for the welfare of the residents and property owners of Tiftonia and Wauhatchie and the City of Chattanooga as a whole and, therefore, constitutes an exercise of power not conferred by law. The Tennessee Legislature provided a remedy whereby aggrieved property owners within the territories to be annexed could have their day in Court to contest the validity of the annexation and specifically set forth the duties of the Trial Judge, which were precisely followed by Judge Boaz.

On page 5 of this Court's opinion in the companion cases involving North Mountain Creek and East Brainerd, this Court stated that the remainder of the assignments can be disposed of by determining whether the Trial Judge applied the proper rule of law in passing upon the facts as he found them to be from all of the evidence. Thereafter, on page 6, this Court concluded that Judge Boaz correctly sustained the validity of the ordinances involved therein. Surely, then, if Judge Boaz understood and correctly applied the proper rule of law in the North Mountain Creek and East Brainerd cases, he understood the proper rule to be applied in the Tiftonia and Wauhatchie cases. However, Judge Boaz correctly determined in view of all of the evidence that it would be an unreasonable exercise of the legislative function delegated to the City of Chattanooga by the Legislature of the State of Tennessee to allow the annexation of Tiftonia and Wauhatchie.

3. Appellees feel that the cases involving Tiftonia and Wauhatchie were tried on a professional basis. The cases were litigated for seven days and involved the use of an expert urban planner and traffic engineer on behalf of Appellees. Never before in Tennessee has such extensive professional information been provided during the trial stages of an annexation case. The Appellants had no expert engineer or anyone from the staff of its engineering municipal consultant to testify or contradict the testimony of Appellees' engineer. The cases involving Tiftonia and Wauhatchie were not emotional attacks upon the city of Chattanooga or upon the concept of annexation. In fact, Appellees agreed that annexation is necessary at times; however, Appellees insisted and proved that there were exceptions. Such exceptions were contemplated by the Tennessee Legislature when the right was prescribed for aggrieved owners of property to challenge the validity of an annexation ordinance in the nature of a quo warranto proceeding. Again, after seven days of extensive testimony and a personal tour of the areas and months of deliberation, Judge Boaz determined that the annexation of Tiftonia and Wauhatchie was an unreasonable exercise of the legislative function delegated to the City of Chattanooga by the Legislature of the State of Tennessee.

In the interest of justice, Appellees respectfully urge the Supreme Court to go beyond the summary of general proof involving the four areas set forth in the Trial Judge's Memorandum Opinion on which this Supreme Court determined that a fairly debatable question arose, and further consider the foregoing information as well as examine the voluminous record of the trial of these cases and grant this Petition to Rehear.

Respectfully submitted,

COFFEY AND O'NEAL

By: THOMAS H. O'NEAL,
Attorney for Appellees.

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX C

In The

SUPREME COURT OF TENNESSEE AT KNOXVILLE

HAMILTON COUNTY LAW

No. 89

STATE OF TENNESSEE, EX REL
OTIS O'DELL, ET AL.,
APPELLEES,

v.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
APPELLANTS.

HAMILTON COUNTY LAW

No. 90

STATE OF TENNESSEE, EX REL
ROBERT J. HICKS, ET AL.
APPELLEES,

v.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
APPELLANTS.

SUPPLEMENT TO BRIEF AND ARGUMENT HERETOFORE FILED ON BEHALF OF APPELLEES, OTIS O'DELL, ET AL, AND ROBERT J. HICKS, ET AL, IN SUPPORT OF PETITION TO REHEAR

THOMAS H. O'NEAL
COFFEY AND O'NEAL
808 MACLELLAN BUILDING
CHATTANOOGA, TENNESSEE 37402
ATTORNEYS FOR APPELLEES.

SUPPLEMENT TO BRIEF AND ARGUMENT HERETOFORE FILED

The Appellees file this supplement in support of their Petition to Rehear. Further, Appellees respectfully request this Court to re-examine its Opinion, which was based upon the finding by Special Justice Leech that the summary of the evidence copied from the Trial Judge's Memorandum shows that the question before the legislative body exercising the power delegated to it by statute raised a fairly debatable question. In order to determine whether or not a fairly debatable question is raised, the real evidence of reasonableness or unreasonableness of the annexation appearing in the record must be examined. Although Judge Boaz summarized generally the order of proof offered by Appellees and Appellants, the real evidence appearing in the record shows that the residents of Tiftonia and Wauhatchie already have those services required for their health, safety and welfare. The real evidence appearing in the record shows that Tiftonia and Wauhatchie are rural communities which have not demonstrated a growth rate of any real consequence and due to the normal growth pattern of the Chattanooga area are not expected to experience a growth of population. To thrust upon the residents of the rural communities of Tiftonia and Wauchatchie additional municipal services, most of which would simply replace services provided by the county or private enterprise is an arbitrary and unreasonable action on the part of the City of Chattanooga without first a determination being made by the City of Chattanooga in compliance fwith TENNESSEE CODE ANNOTATED, 6-309, that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered unless it extends its corporate limits to include Tiftonia and Wauhatchie. The real evidence shows that there is absolutely no foundation whatsoever for a determination that extension of the municipal boundaries of the City of Chattanooga to include Tiftonia and Wauhatchie is necessary for the welfare of

the residents and property owners of Tiftonia and Wauhatchie as well as the City of Chattanooga. An examination of the real evidence appearing in the record will show that there was not a sufficient showing of reasonableness related to the annexation of Tiftonia and Wauhatchie to make that question at least a farily debatable one.

The importance of the function and role of a Trial Judge in a proceeding to contest the validity of an annexation ordinance cannot be over emphasized. Prior to the adoption of TENNESSEE CODE ANNOTATED, Section 6-309, the authority for a municipality to expand its boundaries by ordinance did not exist. This authority was delegated to municipalities by the Tennessee Legislature and in so doing, the Legislature prescribed limits on the authority of the municipality to annex. To prevent the abuse of such delegated authority by elected officials whose action in exercising such authority directly affects citizens who have no voice in the election of such officials, the Legislature provided in TENNESSEE CODE ANNOTATED, Section 6-310, that any aggrieved owner of property lying within territory which is the subject of an annexation ordinance may contest the validity of the annexation ordinance on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the effected (sic) territory and the municipality as a whole and so constitutes an exercise of power not conferred by law. The Legislature further provided in TCA 6-310 that the question for litigation shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality. Having prescribed the ground on which an action in the nature of a quo warranto may be filed to contest the validity of an annexation ordinance and the question to be considered by the Trial Judge during the trial, the Legislature further directed the Court that if it finds the ordinance to be unreasonable then an order shall be issued vacating the same.

Clearly, the function of a Trial Judge in an annexation proceeding is to insure that the property owners in the effected (sic) territory are accorded due process and equal protection under the law. The role of the Trial Judge, therefore, is extremely important. Judge Boaz determined that the ordinances annexing Tiftonia and Wauhatchie were unreasonable and he vacated the same in accordance with TCA 6-310. His decision was not based solely upon the proof in the record, but upon a personal tour of the areas in question. His decision is entitled to a presumption of correctness. Judge Boaz performed the duty of a Trial Judge in an annexation proceeding in a conscientious manner. He patiently heard proof for 7 days, conducted an extensive personal tour of the areas, and thereafter determined that the annexation of Tiftonia and Wauhatchie was unreasonable and an unreasonable exercise of the legislative function delegated to the City of Chattanooga by the Legislature of the State of Tennessee. Appellees spent many hours in preparing their cases and their proof was directly related to the question of whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality. This Court has never stated that its policy is to uphold the action of the municipality in all annexation proceedings. Therefore, the Appellees exercised their right to contest the validity of the annexations of Tiftonia and Wauhatchie. Judge Boaz followed the letter of the law, and in the interest of justice, this Court should re-examine its opinion and sustain the decision of the Trial Judge.

Baker v. *Carr*, 7 L. Ed. 663, prohibits a disproportion of representation to the voting population. TENNESSEE CODE ANNOTATED, 6-309, is a blatant violation of the principle enunciated in *Baker* v. *Carr*. To argue that the interests of the residents of Tiftonia and Wauhatchie are equally represented by elected officials serving on the Chattanooga City Commission due to the fact that they participated in the election of

their representative in the Tennessee Legislature which delegated its authority to extend municipal boundaries is a construction of the due process and equal protection clause of the Federal Constitution so strained beyond all reasonable limits as to be absurd. The property owners of Tiftonia and Wauhatchie did not participate in the election of the municipal officials of the City of Chattanooga, whose action of annexing Tiftonia and Wauhatchie directly affect the residents of Tiftonia and Wauhatchie and affect them more than any other people who do not reside in Tiftonia or Wauhatchie. In effect the residents of Tiftonia and Wauhatchie are being governed by elected officials, whose election they have not participated in, and in view of *Baker* v. *Carr*, clearly demonstrates an unjustifiable inequality of representation. Although the constitutionality of 6-309 has been upheld, Appellees do not believe that its constitutionality has been considered in light of *Baker* v. *Carr*. TCA, 6-309, blatantly violates the equal protection clause and due process clause of the Fourteenth and Fifth Amendment of the Federal Constitution in that it permits statutes or ordinances to be enacted by elected officials which govern or regulate a segment of the voting population who have no participation in the election of such officials. Legislative control of municipalities no less than other state power lies within the scope of relevant limitations imposed by the United States Constitution. The opposite would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivision. It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence. *Baker* v. *Carr*, supra.

Appellees aver that TCA 6-309 is unconstitutional in violation of the Federal Constitution and that the ordinances passed thereunder are null and void. Appellees respectfully request this Court to declare TCA 6-309 unconstitutional and the ordinances thereunder annexing Tiftonia and Wauhatchie null and void.

Appellees again respectfully request this Court to grant their Petition to Rehear.

Respectfully submitted,

COFFEY AND O'NEAL

By: /s/ THOMAS H. O'NEAL,

Attorneys for Appelles.

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX D

In The

SUPREME COURT OF TENNESSEE AT KNOXVILLE

HAMILTON COUNTY LAW

No. 89

STATE OF TENNESSEE, EX REL
OTIS O'DELL, ET AL.,

Appellees,

v.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
APPELLANTS.

HAMILTON COUNTY LAW

No. 90

STATE OF TENNESSEE, EX REL
ROBERT J. HICKS, ET AL.

APPELLEES,

v.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
APPELLANTS.

APPLICATION FOR SPECIAL LEAVE TO FILE SECOND PETITION FOR REHEARING

THOMAS H. O'NEAL
COFFEY AND O'NEAL
808 MACLELLAN BUILDING
CHATTANOOGA, TENNESSEE 37402

ATTORNEYS FOR APPELLEES.

APPLICATION FOR SPECIAL LEAVE TO FILE SECOND PETITION FOR REHEARING

Come the Appellees and make application for special leave to file a second petition for rehearing in their annexation cases and respectfully request the Court for an extension of time in which to file said second petition to rehear.

Appellees will raise new issues regarding the constitutionality of the annexation statutes and ordinances passed thereunder and the action of the Supreme Court in reversing the decision of Trial Judge Boaz. Further, new questions relating to the importance of the role of the Trial Judge in an annexation proceeding and the finding by the Supreme Court that the Trial Judge did not apply to the evidence the legal test prescribed in *Morton* will be raised.

Appellees aver that an additional 15 days is required in which to file their second petition to rehear and respectfully request this Court to grant an extension of 15 days in which to file their second petition.

Respectfully submitted,

COFFEY AND O'NEAL

By: /s/ THOMAS H. O'NEAL

Attorney for Appellees.

[CERTIFICATE OF SERVICE OMITTED]